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**OPINION COMMITTEE**

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**RQ-1089-6A**  
FILE # ML-4714412  
I.D. # 47144

October 1, 2012

Office of the Attorney General  
Attn: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

Via CMRRR -7009 3410 0000 0053 7234

**RE: REQUEST FOR ATTORNEY GENERAL OPINION**

***Issue: Whether a District Judge may order the Director of a Community Supervision and Corrections Department to personally conduct presentence investigations and prohibit the Director from delegating any of the work involved in preparing the presentence investigation report.***

Dear General Abbott:

We, the undersigned District and County Attorneys for Hunt County, Texas, previously sought your opinion on certain issues which arose during pending criminal cases. You declined to render an opinion because the issues on which we sought your guidance were before a court for possible determination and to do so would conflict with the separation-of-powers doctrine established in Article II, Section 1 of the Texas Constitution . We respect your decision in that regard.

The cases in which these issues were raised have now been finally disposed of by final judgments entered on August 1, 2012. The issues inquired about were never ruled upon by the court and are no longer before the court for consideration. In the event that these issues should ever arise again in the future, we would like to have the benefit of your opinion. Since the basis for your prior decision to defer the issuance of an opinion on these issues no longer exists, we again respectfully request your opinion.

Specifically, we respectfully request your opinion as to whether: (1) a district judge has the legal authority to order the director of a community supervision department to personally perform, and not delegate the performance of, a presentence investigation; (2) any such proposed order would be valid in spite of the Director's statutory authority to delegate responsibilities for performing the daily operations of the department and procedures for all functions of the department (including presentence investigations) promulgated by Sections 76.004(a-1) and (b), Texas Government Code; (3) any such order may lawfully require the department director to seek a district judge's permission to delegate the responsibilities for the performance of a presentence investigation; (4) a district judge has the lawful authority to order the director to appear in court for the purpose of presenting a presentence investigation report; and, (5) a district judge may order a specifically named supervision officer to conduct a presentence investigation, thereby overriding the statutory authority of the director to delegate the responsibility of preparing the presentence investigation report and the statutory limitations imposed upon a district judge with regard to Department personnel.

### *Background*

The Hunt County Community Supervision and Corrections Department (the "Department") was established long ago by the district judges trying criminal cases pursuant to an earlier version of Section 76.002 of the Texas Government Code. In early 2004, the same group of judges appointed a Director of the Department pursuant to Section 76.004(a), Texas Government Code, as it existed at the time.

### *Questions Presented*

1. Does a district judge have the legal authority to order the director of the Department to personally conduct a presentence investigation pursuant to Article 42.12, Section 9 of the Texas Code of Criminal Procedure?
2. Does a district judge have the legal authority to prohibit the Director of the Department from delegating any responsibilities for the preparation and presentment of a presentence investigation report?
3. Does a district judge have the legal authority to require the Director of the Department to request permission and receive approval from said judge to delegate the activity involved in the preparation and presentment of a presentence investigation report?
4. Does a district judge have the legal authority to require the Director of the Department to appear in court for the purpose of presenting an ordered presentence investigation report?

5. May a district judge order a specifically named supervision officer employed by the Department to conduct a presentence investigation, thereby overriding the statutory authority of the Director to delegate the responsibility of preparing the presentence investigation report and the statutory limitations imposed upon a district judge with regard to Department personnel?

### *Discussion*

The current version of Section 76.002 of the Texas Government Code requires the district judge or district judges trying criminal cases in each judicial district and the statutory county court judges trying criminal cases in the county or counties served by the judicial district to establish a community supervision and corrections department.

Section 76.004(a) of the Texas Government Code requires the judges described in Section 76.002 of said Code to appoint a “department director” who meets certain minimum eligibility requirements.

Section 76.004(a-1) of the Texas Government Code, among other things, states that the “...department director shall perform or *delegate the responsibility for performing* the following duties:

- (1) Overseeing the daily operations of the department; ...
- (4) Establishing policies and procedures for all functions of the department;  
....”  
(Emphasis added).

Subsection (b) of Section 76.004 requires the department director to “...*employ a sufficient number of officers and other employees to conduct presentence investigations*, supervise and rehabilitate defendants placed on community supervision, enforce the conditions of community supervision, and staff community corrections facilities. *A person employed under this subsection is an employee of the department and not of the judges or judicial districts*”. (Emphasis added).

With regard to personnel decisions of the department, Section 76.0045(a) of the Texas Government Code specifically limits the responsibility of a judge described by Section 76.002 to the appointment of the department director and a fiscal officer.

Section 9 of Article 42.12 of the Texas Code of Criminal Procedure addresses presentence investigations. Subject to certain exceptions, before the imposition of sentence by a judge in a felony case, the judge shall direct a “supervision officer” to conduct a presentence investigation and render a report to the judge on certain matters.

Under Article 42.12, Section 2(3), Texas Code of Criminal Procedure, “ ‘Supervision Officer’ means a person appointed or employed under Section 76.004, Government Code, *to supervise defendants placed on community supervision.*” (Emphasis added).<sup>1</sup>

The director of the Department does not perform the functions of a supervision officer in that the director does not supervise persons placed on probation. Instead, the director of the Department is to perform those functions specifically set forth in Section 76.004(a-1) and (b), Texas Government Code.

It is important to note that the 79<sup>th</sup> Legislature enacted House Bill 1326, effective May 30, 2005, which greatly changed the prior statutory authority of judges trying criminal cases to participate in the management of a community supervision and corrections department. Specifically, in direct response to a number of lawsuits initiated against judges due to alleged negligent management of the Department or other actionable conduct of their employees, former Section 76.002 (b), which had entitled the judges to participate in the management of the department, was repealed in its entirety. Section 76.002 (a) (2) was amended to remove the judges’ requirement to employ district personnel and replaced with the requirement that the judges only approve the department’s budget and a community justice plan. HB 1326 also added the language in current Section 76.004 (b) which specifies that the employees of the department are not employees of the judges. Additionally, HB 1326 added the judicial immunity provisions of Section 76.0045, which also clearly limits the judges’ responsibilities to the appointment of a department director and fiscal officer and approval of the department’s budget.<sup>2</sup>

### *Conclusion*

Based upon the foregoing statutory provisions, we request that the Attorney General render an opinion as to whether: (1) a district judge has the legal authority to order the director of a community supervision department to personally perform, and not delegate the performance of, a presentence investigation; (2) any such proposed order would be valid in spite of the Director’s statutory authority to delegate responsibilities for performing the daily operations of the department and procedures for all functions of the department (including presentence investigations) promulgated by Sections 76.004(a-1) and (b), Texas Government Code; (3) any such order may lawfully require the department director to seek a district judge’s permission to delegate the responsibilities

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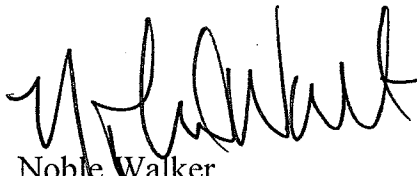
<sup>1</sup> Section 76.005, Texas Government Code, addresses the standards for officers subject to appointment by the Department Director. That section uses the terms, “appointed” and “appointment”, with regard to officers employed by the Department Director. Clearly, the use of the term, “appointed”, in the definition of “Supervision Officer” was intended to solely refer to those individuals employed by the Department Director pursuant to Section 76.004(b), Texas Government Code.

<sup>2</sup> See the enclosed HB 1326 House Research Organization and Senate Research Center bill analysis; *see also*, Texas House of Representatives, Committee Broadcast Archives 79<sup>th</sup> Session, Judiciary, recording dated 03/07/05, beginning at 51:19 minute mark and ending at the 2:18:44 minute mark; webpage: <http://www.house.state.tx.us/video-audio/committee-broadcasts/committee-archives/?committee=330&session=79>.

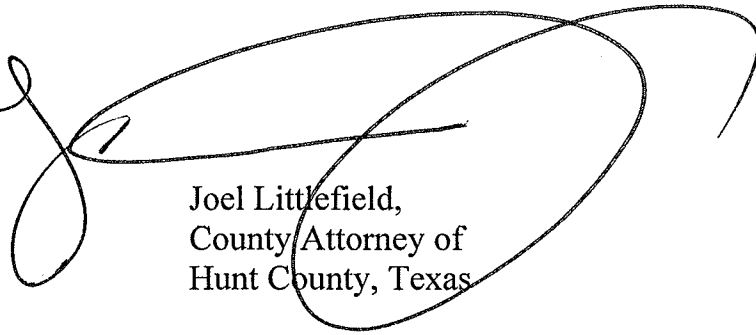
for the performance of a presentence investigation; (4) a district judge has the lawful authority to order the director to appear in court for the purpose of presenting a presentence investigation report; and, (5) a district judge may order a specifically named supervision officer to conduct a presentence investigation, thereby overriding the statutory authority of the director to delegate the responsibility of preparing the presentence investigation report and the statutory limitations imposed upon a district judge with regard to Department personnel.

Thank you for your time and consideration.

Very truly yours,



Noble Walker,  
District Attorney of  
Hunt County, Texas



Joel Littlefield,  
County Attorney of  
Hunt County, Texas