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OPINION COMMITTEE

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February 4, 2009

RQ-0782-GA

Hon. Greg Abbott  
Attorney General of Texas  
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FILE # 45993  
I.D. # 45993

ATT: Ms. Susan Gusky, or her successor, Chair  
Opinion Committee

Dear General Abbott:

This office was advised that, orally on January 23, 2009, and by letter dated January 27, 2009, the Hon. William T. Hughey, Judge of the 71<sup>st</sup> District Court, notified the Director of the Harrison County Community Supervision and Corrections Department that his position would be declared open, and posted for applications in the month of February, 2009. This action was taken without consultation with, and without the knowledge of, Hon. Jim Ammerman, II, Judge of the County Court at Law of Harrison County. Judge Hughey acted unilaterally in the good faith belief that he was solely responsible for the position of the Director.

This office issued an opinion stating that §76.002, Government Code, as amended effective May 30, 2005, requires any decision on a vacancy in the position of Director of Community Supervision and Corrections Department, and the filling of that vacancy, be made jointly by the District Judge and the judge of the County Court at Law.

Harrison County has only one District Court, the 71<sup>st</sup> Judicial District, and there is only one judge of that court, Hon. William T. Hughey. Likewise, Harrison County has only one statutory county court, presided over by Hon. Jim Ammerman, II. The County Court at Law for Harrison County was created by §25.1041, Government Code, on September 1, 1987, and its jurisdiction in criminal matters is limited to that of county courts, meaning, for our purposes, Class "B" and "A" misdemeanors. §§ 25.0003 & 25.0004, Government Code.

Judge Hughey opines that he is the only judge in Harrison County qualified to act under §76.002. He reasons that since §76.002 speaks in terms of, "the statutory county court judges trying criminal cases", and §76.003 (b) (6), in listing the members of the Community Justice Council, speaks of, "a judge of a statutory county court exercising criminal jurisdiction in a county served by the department ...", the legislature must have intended that the qualifications of the statutory county judges mentioned in §76.002 be different from those of the statutory county

judges listed in §76.003 (b) (6). Thus, the qualifying difference among statutory county court judges would be whether they have jurisdiction of misdemeanors only, or of both felonies and misdemeanors. His argument is that statutory county court judges whose courts have misdemeanor jurisdiction only are not among "the judges described in §76.002", which is the phrase uniformly used in Chapter 76 to describe the duties, responsibilities and immunities of the judges overseeing the CSCD Directors and fiscal officers, and their budgets. Judge Hughey states that the statutory county court judge, having only misdemeanor jurisdiction, is the beneficiary of services provided by the CSCD, but not a participant in the duties of "judges described in §76.002".

"The judges described in §76.002", are responsible for those matters covered in that section, as well as in §76.003, establishing the Community Justice Council; and §76.004, appointing the Director of the CSCD, and a fiscal officer, along with their compensation, for the CSCD if they deem it advisable, and for filling vacancies to the Director and fiscal officer positions.

The judicial responsibilities and the immunity of such judges is outlined in §76.045. By agreement between Judge Hughey, and Joe Black, Criminal District Attorney for Harrison County, the question posed is:

Is a judge of a County Court at Law the jurisdiction of which is limited to misdemeanors, as a matter of law among those, "... statutory county court judges trying criminal cases in the county or counties served by the judicial district ...", as stated in §76.002, Government Code, and thus one of, "the judges described in §76.002"?

The writer has found no reported case, nor Attorney General Opinion directly dealing with this question as it pertains to statutory county courts.

A review of the legislative history of the 2005 amendments to Chapter 76, being HB-1326, reveals no statement excluding statutory county courts with misdemeanor jurisdiction only in favor of those with felony or dual jurisdiction. In fact, the testimony at the House Judiciary Committee's taking of testimony on HB 1326 on March 7, 2005, reveals that the question of why statutory county judges were included in §76.002 was posed by the Committee fairly early in the proceeding to the bill's primary author, Rep. Ruben Hope. Rep. Hope deferred to the resource witnesses for a response to this question. The testimony responsive to this query included the following:

1. Hon. Robert Branson, District Judge, Dallas County, noted that the pre-amendment statutory scheme, while excluding statutory county court judges from appointing a Director, did involve them in the management of the CSCD's, and as a matter of policy change, he felt they should be included, but that the ultimate decision was left to the Committee;
2. Hon. Mary Anne Bramblett, District Judge, El Paso County, stated that the statutory county judges have a stake in the CSCDs' operations and should be clearly included or excluded in the bill. She stated the El Paso District Judges welcomed the participation of the statutory county court judges;
3. Hon. Brent Car, Judge, Tarrant County Criminal Court #9 then testified. (This court,

although having concurrent felony jurisdiction, [§25.2223 Government Code], handles a docket that contains misdemeanors exclusively. See:

[https://egov.tarrantcounty.com/web/guest/departments/courts/criminal?p\\_p\\_id=criminal\\_docket\\_WAR\\_criminaldocket&p\\_p\\_lifecycle=0&p\\_p\\_state=maximized&p\\_p\\_mode=view&\\_crimindocket\\_WAR\\_criminaldocket\\_searchid=docketSearch&\\_crimindocket\\_WAR\\_criminaldocket\\_page=5&\\_crimindocket\\_WAR\\_criminaldocket\\_action=docket&\\_crimindocket\\_WAR\\_criminaldocket\\_form-submit=true](https://egov.tarrantcounty.com/web/guest/departments/courts/criminal?p_p_id=criminal_docket_WAR_criminaldocket&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_crimindocket_WAR_criminaldocket_searchid=docketSearch&_crimindocket_WAR_criminaldocket_page=5&_crimindocket_WAR_criminaldocket_action=docket&_crimindocket_WAR_criminaldocket_form-submit=true), being the published docket of that court.) Judge Car stated that misdemeanor probation fees collected do not just go to the supervision of misdemeanor probationers, but to felony probationers as well, and that should a bill then pending to shorten the maximum felony probation period to five years pass, misdemeanor fees would be an even greater percentage of collected fees.

4. Carl Reynolds, General Counsel for the Texas Department of Criminal Justice, pointed out that the language of §76.002 makes the participation of the judges there described mandatory;
5. Marshall Shelsy, staff attorney for the County Courts at law in Harris County, pointed out that, statewide, 44% of all probationers are misdemeanor, and in Harris County the figure is 33%; that a third of all pending cases in the statutory county courts involve defendants with prior felonies, pending felonies, or parole involvement, thus misdemeanor courts do not deal only with first offenders.

The most telling aspect of the testimony before the Committee was that misdemeanors and felonies were spoken to inclusively. No witness made any statement that a statutory county judge would be excluded from the description in §76.002, because they did not have felony jurisdiction.

(The entire committee hearing may be found at:

<http://www.house.state.tx.us/committees/audio79/broadcasts.php?session=79&committeeCode=330>, and click on the broadcast link dated 3/7/05. Testimony on this bill begins at approximately 53 minutes into the meeting)

The Bill Analysis, published March 23, 2005, to the Judiciary Committee of the Texas House, (copy attached), says that, "The bill also would limit a district judge's duties in regard to CSCD (sic) and require that statutory county court judges share the CSCD responsibilities of district judges." This report makes no distinction between statutory courts with misdemeanor or felony jurisdictions.

Although it does not deal directly with statutory county courts, GA-0357, 2005 WL 2269244, (9/16/05), is instructive in construing §76.002. A full copy of that opinion is attached. In GA-0357, the question concerned what district judges could be said were, "trying criminal cases". In making this determination, your office stated that a §76.002 District Judge was one that dealt with criminal cases that involve the, "programs created in Chapter 76 such that a judge would have an interest in approving the department's budget and community justice plan ..."; and one that, "makes a decision that would involve a Chapter 76 program, ... or sending a person to a department-managed facility". No formula exists for frequency or numbers. However, in light

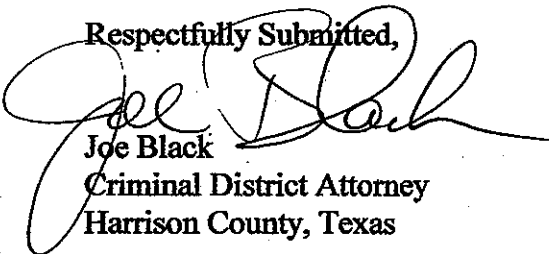
of the relative positions of the Harrison County officials, it might be helpful to examine what the District and County Court at Law judges in Harrison County do so far as availing themselves of the programs provided by the CSCD.

The Harrison County CSCD provides the Chapter 76 programs within the 71<sup>st</sup> Judicial District, and Harrison County, the geographic boundaries of which coincide. In the calendar year 2008, 127 misdemeanor defendants were placed under the pretrial supervision of the CSCD, as well as 129 felony defendants. Also during that time, the County Court at Law examined and disposed of, not counting dismissals, 999 criminal cases through jury trial or pleas of guilty or nolo contendere. Among those cases in 2008, the County Court at law ordered 266 defendants be placed under the supervision of the Harrison County CSCD, and among those, the following programs sponsored or supervised by the CSCD were used by that court, [the "(n)" being the number of felony defendants ordered by the District Court to use the same programs]: 52 (28) were ordered to undergo Anger Management counseling, 11 (5) were ordered to complete the Batterers Intervention program, 19 (81) were ordered to undergo Drug Offender Education, 134 (15) were ordered to complete the DWI Education program, 6 (14) were ordered to install ignition interlock devices, 2 (9) were ordered to complete the Job Readiness Program, and 7 (61) were ordered to complete a Theft Class.

As of February 2, 2009, the Harrison County CSCD had under its direct and indirect post trial supervision, 743 felony cases and 908 misdemeanor cases, and was providing pretrial supervision services to 47 felony cases and 73 misdemeanor cases. In comparison to the state and Harris County statistics quoted by witness Shelsy above, misdemeanor cases are 55% of the current caseload of the Harrison County CSCD.

Article 26.04 (a), Code of Criminal Procedure provides that, "The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for or charged with a misdemeanor punishable by confinement or a felony." The Harrison County Indigent Defense plan, promulgated pursuant to that statute, was formulated by Hon. Bonnie Leggat, the then presiding judge for the 71<sup>st</sup> Judicial District, and Hon. Jim Ammerman, II, Judge of the County Court at Law on October 31, 2007.

Respectfully Submitted,



Joe Black  
Criminal District Attorney  
Harrison County, Texas

JB/atd  
enc.