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OPINION COMMITTEE

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May 3, 2011

RQ-0969-GA

FILE # ML-46741-11

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OPEN RECORDS DIVISION

Hon. Greg Abbott
Attorney General of Texas
attention: Opinion Committee
P.O. Box 12548
Austin Texas 78711

Re: request for attorney general's opinion regarding judicial approval of advance payment of nonresident witnesses' travel expenses.

Dear Mr. Attorney General Abbott:

Pursuant to § 402.043 of the Texas Government Code, I respectfully ask that you provide this office with a formal written opinion regarding the following questions:

1. Does article 35.27 of the Texas Code of Criminal Procedure require that a district attorney obtain the approval of the judge presiding over a case in a county or district court before advancing funds to a nonresident witness for the travel expenses of the witness?
2. May a judge of a county court at law or district court decline to approve a request for state reimbursement of the travel expenses of a nonresident witness solely because the district attorney did not obtain the trial court's approval before advancing the funds to the witness?

By way of explanation, county officials have provided the Montgomery County district attorney with a bank credit card designated as the "victim witness travel card," from which the district attorney may pay in advance the travel expenses of its nonresident witnesses subpoenaed to testify in criminal cases. The county then pays the monthly credit card bill, upon approval by the commissioners' court, from its budget for "court operations."

During a review of the expenditures charged to the "court operations" budget, the judges currently serving on the county's office of court administration committee have questioned the propriety of the district attorney's advance payment of the travel expenses of

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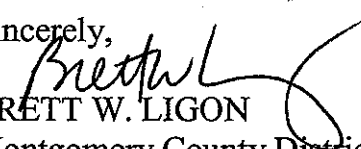
State's witnesses without obtaining prior judicial approval. As we understand it, the judges' reasoning is that: (1) section 7 of art. 35.27 authorizes an advance only to a witness "who will be entitled to reimbursement under this article"; (2) section 4 of that article requires judicial approval of an application for state reimbursement of witness travel expenses; (3) and therefore, advances should be made only after securing judicial approval of both the advance payment and the application for reimbursement.

The judges informed the county auditor of their concerns on March 15, 2011; and they requested that the county withhold payment of the monthly credit card bill representing the State's advance payment of witness travel expenses for the preceding month, which included charges for the purchase of airline tickets for two witnesses who were originally subpoenaed to testify in the trial of a murder case styled *The State of Texas v. Seldon Wayne Colvin* on March 8, 2011 (the *Colvin* case was later continued and the airfare was refunded in the form of a credit on the account). Due to that request, the credit card bill was not paid for several weeks, pending resolution of the issue of whether prior judicial approval of witness travel expenses should be obtained.

The various parties eventually agreed to continue county payment of expenses charged on the victim witness travel card while the parties undertook a good-faith effort to resolve the underlying legal issue. No agreement has been reached, however, and the district attorney therefore requests the attorney general's guidance on the issue of whether the statute permits the district attorney to pay in advance the travel expenses of nonresident witnesses without first obtaining the approval of the judge presiding over the court in which the witness is subpoenaed to testify.

This office has investigated the issue and its brief is being submitted contemporaneously with this request, as required by § 402.043 of the Government Code. Please contact me or the author of the enclosed brief if any additional information may be required.

Sincerely,


BRETT W. LIGON

Montgomery County District Attorney
(936) 539-3518

Enclosure.

cc: Hon. Patrice McDonald, Judge, Montgomery County Court at Law No. 3
Hon. Phyllis L. Martin, Montgomery County Auditor

MONTGOMERY COUNTY DISTRICT ATTORNEY'S BRIEF IN SUPPORT OF REQUEST FOR OPINION OF THE ATTORNEY GENERAL REGARDING THE NEED FOR JUDICIAL APPROVAL OF ADVANCE PAYMENT OF NONRESIDENT WITNESSES' TRAVEL EXPENSES

The Montgomery County District Attorney is requesting an attorney general's opinion regarding the following issues:

1. Does article 35.27 of the Texas Code of Criminal Procedure require that a district attorney obtain the approval of the judge presiding over a case in a county or district court before advancing funds to a nonresident witness for the travel expenses of the witness?
2. May a judge of a county court at law or district court decline to approve a request for state reimbursement of the travel expenses of a nonresident witness solely because the district attorney did not obtain the trial court's approval before advancing the funds to the witness?

The district attorney respectfully suggests that the attorney general answer both of these questions in the negative, because: (1) both the legislative history of the witness fee statute and the plain wording of the current version of the statute indicate that only post-trial approval of the application for state reimbursement is necessary, and (2) a requirement that a prosecutor seek pretrial approval of an advance to a particular witness would entail unnecessary interference with the prosecutor's constitutional authority to represent the State in criminal proceedings.

For a long time, pretrial judicial approval of a subpoena or attachment *was* a statutory prerequisite for the payment of a nonresident witness's travel expenses. The 1973 revision of article 35.27 eliminated that requirement, demonstrating clear legislative

intent to require only post-trial judicial approval of a request for reimbursement of the travel expenses of a witness.

Prior to April 20, 1883, Texas had no statutory provision for payment of the travel expenses of nonresident witnesses in criminal cases. *See Murray v. Gillespie*, 72 S.W. 160, 161 (Tex. 1903). The 1883 Legislature promulgated a witness fee statute that provided for state reimbursement of witness travel expenses at the rate of three cents per mile and one dollar per day. That statute, which was later became article 1093 of the 1895 Code of Criminal Procedure,¹ required both pretrial judicial approval of the attachment of the witness, and post-trial judicial approval of the bill subsequently submitted by the witness:

2. Witness fees shall be allowed to such state witnesses only as the district or county attorney shall state in writing are material for the state, and to witness for defendant after he has made affidavit that the testimony of the witness is material to his defense, stating the facts which are expected to be proved by the witness, which certificate and affidavit must be made at the time of procuring the attachment for, or taking the recognizance of, the witness; *provided, that the judge to whom an application for attachment is made may, in his discretion, grant or refuse such application when presented in term time.* No attachment shall be issued in a felony case until the state's attorney shall have first made the statement in writing, or the defendant shall have made the affidavit, which will authorize the payment of the witness to be attached.

3. Before the close of each term of the district court the witness shall make affidavit in writing, stating the number of miles he will have traveled going to and returning from the court by the nearest practicable conveyance, and the number of days he will have been necessarily absent going to and returning from the place of trial, which affidavit shall be filed with the papers of the case . . .

¹ The various revisions of the Texas Code of Criminal Procedure, dating back to the 1879 revision, are available at the internet website of the Texas State Law Library at: <http://www.sll.state.tx.us/codes/revised.html>.

4. It shall be the duty of the district or criminal judge, when any such bill is presented to him, to examine the same carefully and to inquire into the correctness thereof and to approve the same in whole or in part, or to disapprove the entire bill as the facts and law may require, and said bill, with the action of the judge thereon, shall be entered on the minutes of said court; and immediately on the rising of said court it shall be the duty of the clerk thereof to make a certified copy from the minutes of said court of said bill, and the action of the judge thereon, and transmit the same by mail in registered letter to the comptroller of public accounts, for which service the clerk shall be entitled to a fee of twenty-five cents, to be paid by the witness [emphasis supplied].

The judicial-approval provisions of article 1093 were retained, substantially unchanged, when the statute was renumbered as article 1138 of the 1911 Code of Criminal Procedure, article 1036 of the 1925 Code of Criminal Procedure, and finally article 35.27 of the 1966 Code of Criminal Procedure.

In 1973, however, the statute was completely rewritten by the 63rd Legislature. See Act of June 14, 1973, 63rd Leg., R.S., ch. 477, 1973 Tex. Gen. Laws 1287. Among other changes, the amended statute: (1) omitted the requirement that the witness be subpoenaed and attached, and permitted compensation of witnesses whose presence was merely "requested in writing by the prosecuting attorney or the court"; (2) omitted any requirement that the prosecutor obtain judicial approval of the issuance of a subpoena to a witness expected to seek state reimbursement for travel expenses; (3) instead required judicial approval only of an application for compensation filed by the witness or his assignee, prior to submission of the application to the comptroller; and (4) expressly permitted the county to advance funds to a witness "upon request of the district attorney or other prosecutor." As originally amended in 1973, the pertinent portions of the statute

read as follows:

Art. 35.27. Compensation of nonresident witnesses

Section 1. Expenses for Nonresident Witnesses. Every person subpoenaed by either party or otherwise required or *requested in writing by the prosecuting attorney* or the court to appear for the purpose of giving testimony in a criminal proceeding who resides outside the State or the county in which the prosecution is pending shall be compensated by the State for the reasonable and necessary travel and daily living expenses he incurs by reason of his attendance as a witness at such proceeding.

Section 2. Amount of Compensation for Expenses. Any person seeking compensation as a witness shall make an affidavit setting out the travel and daily living expenses necessitated by his travel to and from and attendance at the place he appeared to give testimony, together with the number of days that such travel and attendance made him absent from his place of residence . . .

* * *

Section 4. Application and Approval by Judge. Compensation to witnesses as provided for in this Article shall be paid by the State to the witness or his assignee. Claim shall be made by sworn application to the Comptroller of Public Accounts, a copy of which shall be filed with the clerk of the court, setting out the facts showing entitlement as provided in this Article to the compensation, *which application shall be presented for approval by the judge who presided over the court or empaneled the grand jury* before whom the criminal proceeding was pending . . .

Section 5. Payment by State. The Comptroller of Public Accounts, upon receipt of *a claim approved by the judge*, shall examine it and, if he deems the claim in compliance with and authorized by this Article, draw his warrant on the State Treasury for the amount due the witness . . .

* * *

Section 7. Advance by County. The county in which a criminal proceeding is pending, *upon request of the district attorney* or other prosecutor charged with the duty of prosecution in the proceeding, may advance funds from its treasury to any witness who will be entitled to compensation under this Article in such amounts as may be reasonably necessary to enable the witness to attend as required or requested, including

any sums in excess of the compensation provided for by this Article which are required for compliance with Section 4 of Article 24.28 in securing the attendance of a witness from another state under the Uniform Act, and upon any such advance or advances, the county shall be entitled to reimbursement by the State, as an assignee of compensation due a witness from the State . . . [emphasis supplied].

The statute has since been amended on several occasions—for instance, in 1993 the term “compensation” was changed to “reimbursement” throughout the text of the statute—but its basic structure remains the same since the 1973 revision. And that structure is inconsistent with any construction permitting a trial court to require that the prosecution obtain pretrial approval of advances to its nonresident witnesses.

In discerning legislative intent, courts may presume that the omission of a previously existing provision from a revised version of a statute is intentional. *See In re Ament*, 890 S.W.2d 39, 41 (Tex. 1994). Generally speaking, there is an inference that omissions from a statute are intentional. *Sergeant Enterprises, Inc. v. Strayhorn*, 112 S.W.3d 241, 248 (Tex. App.—Austin 2003, no pet.). With regard to witness reimbursement, the relevant statute made pretrial judicial approval a prerequisite for obtaining nonresident witness reimbursement for approximately ninety years, but in 1973 the requirement of pretrial judicial approval was omitted from the revised statute. The omission must have been intentional, and the revised statute demonstrates clear legislative intent to render pretrial approval unnecessary.

In fact, while the old statute required judicial approval of the issuance of a subpoena or attachment to a nonresident witness who may seek reimbursement, the current statute omits the requirement of a subpoena altogether, and permits reimburse-

ment of a witness whose presence is merely “requested in writing by the prosecuting attorney.” TEX. CODE CRIM. PROC. ANN. art. 35.27, § 1(a) (West 2006). A written request can be issued without any participation of the court or the clerk, and the statute simply cannot be construed to require judicial approval of the “request” for the attendance of the witness.

Section 7 of the current version of the statute authorizes the county, “upon request of the district attorney,” to advance funds to a nonresident witness whose appearance has been “required or requested” by the prosecutor. The statute does *not* say that the county is authorized to make the advance only “upon request of the district attorney approved by the court in which the criminal case is pending.”

Section 7 does specify that an advance should be made by the county “to any witness who will be entitled to reimbursement” from the State, but the determination—at that point—of the eventual eligibility of the witness for state reimbursement is left to the discretion of the prosecutor and the county official responsible for the disbursement. There is no mention of courts, judges or judicial approval in § 7 of the article.

The only judicial approval contemplated by the statute since its 1973 revision is the requirement in § 4 that the judge approve the sworn application for reimbursement after it is filed with the clerk of the court, after conclusion of the trial. That approval is retrospective, not prospective. The judge is asked to certify that the witness did appear in court on the dates set out in the sworn application, after traveling from a location outside the county. This requirement prevents fraud and relieves the comptroller of the responsibility for investigating and verifying the truth of each claim for reimbursement. A

provision for post-trial judicial approval of the application for reimbursement, before it is transmitted to the comptroller, simply cannot be read as a requirement for pretrial approval of the county's advance of funds.

Finally, an individual judge should not be permitted to refuse approval of the post-trial application for reimbursement on the arbitrary grounds that the court was not asked, in advance of trial, to approve a request for the attendance of a particular witness. Such a requirement would defeat the legislative intent in revising the statute to eliminate the requirement of pretrial judicial approval of a subpoena to a nonresident witness. Appropriate grounds for withholding approval of the reimbursement application, under the current statute, would include a determination that the application is not factually accurate, or an exercise of the court's statutory discretion to limit reimbursement of more than two character witnesses for each party under § 9 of the statute.

The fact that a trial court is expressly given the discretion to limit reimbursement of multiple *character* witnesses strongly suggests that court cannot limit the number of other witnesses called by a party. "It is a well settled rule of construction that the 'express mention or enumeration of one person, thing, consequence, or class is equivalent to an express exclusion of all others.'" *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982), quoting from *State v. Mauritz-Wells Co.*, 175 S.W.2d 238, 241 (Tex. 1943).

Any other construction of the statute would raise a serious separation-of-powers issue. A district attorney's right to exercise "his own discretion in the preparation of [criminal] cases for trial" is constitutionally protected, and "the Legislature may not remove or abridge a district or county attorney's exclusive prosecutorial function, unless

authorized by an express constitutional provision.” *Meshell v. State*, 749 S.W.2d 246, 255 (Tex. Crim. App. 1987). The choice of witnesses to be called during trial is a core function of the prosecutor’s constitutional duty to represent the State, and the Legislature cannot authorize unnecessary interference with that function. *Id.* at 257; *Texas Commission on Environmental Quality v. Abbott*, 311 S.W.3d 663, 674-75 (Tex. App.—Austin 2010, pet. dism’d).

Permitting a trial court to disallow an advance of travel expenses to a complaining witness in a criminal case would effectively give that court an impermissible veto over the prosecution of the criminal case. In Texas the decision to dismiss a criminal prosecution is vested within the sole discretion of the prosecuting attorney, *see State v. Gray*, 801 S.W.2d 10, 11 (Tex. App.—Austin 1990, no pet.), and the Legislature could not constitutionally permit a trial court to terminate a criminal case by refusing to authorize an advance payment of the travel expenses of the complaining witness.

Even if the importance of a witness other than the complainant is not immediately apparent, it is not feasible to require the prosecution to explain the importance of the witness’s testimony and obtain permission to advance funds to the witness. There is no provision in the Code for an ex parte hearing in which the State may confide its trial strategy to the court without revealing confidential work product to the defense. And a trial court that cannot lawfully comment upon the weight to be accorded the testimony of a particular witness, *see TEX. CODE CRIM. PROC. ANN.* art. 38.05 (West 1979), is an exceedingly poor position to investigate and determine the relative importance of witnesses subpoenaed by the State. The decision as to whether county resources should

be expended to ensure the attendance of a particular witness in a criminal case should remain within the discretion of the prosecutor and the county officials who are elected to make decisions regarding a county's finances.

Therefore, it is respectfully suggested that the attorney general determine that: (1) article 36.27 does not require a prosecutor to obtain pretrial judicial approval of an advance of witness travel expenses; and (2) a trial court cannot refuse to approve a request for reimbursement of expenses advanced by the county to a witness solely because the court was not asked to approve the advance prior to trial.

Respectfully submitted,

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Date: May 3, 2011