

# TOM GREEN COUNTY



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REQUEST FOR ATTORNEY GENERAL'S OPINION *Opinion Committee*

November 1, 1997

Opinion Committee  
Attorney General Of Texas  
Att: Sara Shirley  
209 W. 14th St.  
Price Daniel Sr. Bldg.  
Austin, TX 78701

*RD-1028*

*# ML-39900-97*  
*# 39900*

**TOPIC:** Did the enactment of the new Section 106.041, Texas Alcoholic Beverage Code (Driving Under the Influence of Alcohol by a Minor) serve to exclude persons under the age of 21 years of age from prosecution for the offenses set out in Sections 49.04, Texas Penal Code (Driving While Intoxicated) and 49.09 Texas Penal Code (Enhanced Offenses and Penalties)?

**DISCUSSION:** A question has arisen among law enforcement and the local courts regarding whether the Courts at Law and the District Courts can prosecute juveniles and minors under the age of 21 years for the offenses of Driving While Intoxicated, Class A and B, and for Driving While Intoxicated, third degree felony. This concern has resulted from an issue reportedly raised at various law conferences as to whether the new Class C offense of Driving Under the Influence of Alcohol by a Minor in the Texas Alcoholic Beverage Code is a more specific and more newly-enacted statute than the D.W.I. law as applied to this class of persons, and would result in giving the Municipal Courts and the Justice Courts (and possibly the juvenile courts) exclusive jurisdiction of such persons upon their first arrest while driving after consuming alcohol.

The effect of this interpretation of the law is that law enforcement officers would no longer be able to arrest and the county and district courts could not prosecute persons over the age of 17 years of age and under the age of 21 for any degree of Driving While Intoxicated, nor could juveniles be referred to the juvenile court for delinquent conduct for such acts, and the county and district courts would thus be divested of jurisdiction of such persons, even if a blood or breath alcohol test indicated that the offender was clearly intoxicated under the law and might have multiple prior convictions for D.W.I. committed prior to the effective date of this new statute.

A counter argument which could be made is that there is a difference in the legal meaning of the terms "having any detectable amount of alcohol in the minor's system" referred-to in Section 106.041(a) Texas Alcoholic Beverage Code, and "intoxicated", as defined in Section 49.01(2), Texas Penal Code; and that, therefore, there is not a true conflict between these laws.

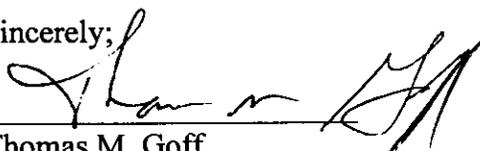
Or, alternatively, it could be argued that in cases where the defendant showed evidence of impairment or gave a sample of breath or blood which contained more than .10 percent blood-alcohol, the term "intoxicated" should be considered to be more specific than the term "having any detectable amount of alcohol in the minor's system", and should be given effect as the more specific statute.

It can be further argued that in various places in the new statutes involving abuse of alcohol and then driving by a minor, the D.W.I. statute is mentioned inferentially as still applicable to such persons, both where it is stated in Section 106.041(g) that the new law is "not a lesser-included offense" of D.W.I., and where the new specified warning for obtaining consent to a breath or blood test from a minor as set out in Section 724.015(4), Texas Transportation Code, mentions such persons as being liable to being charged with D.W.I. crimes as a possibility.

The County Attorney's office views the practical issue as being whether the legislature, by enacting this new law concerning minors in the Texas Alcoholic Code at the behest of the federal government, intended to make the laws involving the abuse of alcohol stronger regarding the issue of drinking and driving, or whether it intended to make the laws weaker regarding the class of persons represented in this new law, and exempt them from arrest and prosecution under the penal code in situations where at their arrest they met the definition of "intoxicated" as defined in Section 49.01(2) of the Texas Penal Code .

Thank you for your attention to this matter.

Sincerely;



Thomas M. Goff

County Attorney for Tom Green County, Texas

## APPLICABLE STATUTES AND CASES:

### Texas Government Code, Section 311.026:

Resolves conflict between general and specific statutes, but also favors construction so that both statutes may be given effect, if possible.

### Texas Penal Code, Section 1.05:

Sets as a goal to promote justice and effect the objectives of that Code. Also incorporates various sections of the Government Code regarding statutory construction

### Texas Alcoholic Beverage Code, section 106.041(g):

States that an offense under this section is not a lesser-included offense under Section 49.04, Texas Penal Code (and, by implication, Section 49.09, Texas Penal Code).

### Texas Transportation Code, section 724.015(4):

Requires the officer giving a minor certain warnings regarding the taking of a breath sample, makes reference to Section 49 of the Penal Code, and states that the minor “may be subject to criminal penalties less severe than those provided under that chapter.”

### State v. Mancuso, (Tex. Cr. App. 1996)

Addresses the concept of in pari materia in statutory construction.