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OPINION COMMITTEE



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April 7, 2011

The Honorable Greg Abbott
Attorney General of Texas
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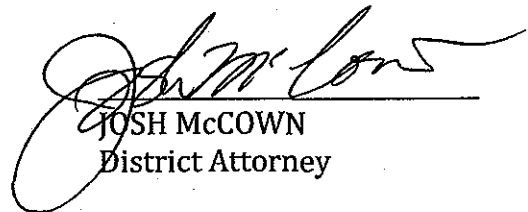
Attention: Opinion Committee

Dear General Abbott:

We request your opinion on whether a constitutional county court judge who attended law school and passed the bar exam, but never activated his law license qualifies as "an attorney licensed by the state" for purposes of Article 18.01(i) of the Texas Code of Criminal Procedure.

Please consider this letter and enclosed memorandum as the Wharton County District Attorney's request for a legal opinion on this issue.

Sincerely,


JOSH McCOWN
District Attorney

MEMORANDUM IN SUPPORT OF REQUEST FOR ATTORNEY GENERAL OPINION

I. ISSUE

Does a constitutional county court judge whose law license and bar membership status have always been inactive qualify as “an attorney licensed by the state” for purposes of Article 18.01(i) of the Texas Code of Criminal Procedure?

II. BACKGROUND

The Honorable John Murrile presided over the Wharton County Court until his retirement at the end of 2010. Judge Murrile was not a licensed attorney. While Judge Murrile presided over Wharton County’s only county court, justices of the peace within the county regularly issued blood search warrants under Article 18.01(i) of the Code of Criminal Procedure, which states:

In a county that does not have a judge of a municipal court of record who is an attorney licensed by the state, a county court judge who is an attorney licensed by the state, or a statutory county court judge, any magistrate may issue a search warrant under Subdivision (10) or Subdivision (12) of Article 18.02 of this code. This subsection is not applicable to a subsequent search warrant under Subdivision (10) of Article 18.02 of this code.

The Honorable Philip Spenrath took the bench of the Wharton County Court on January 4, 2011. Judge Spenrath attended the Thomas M. Cooley School of Law in Lansing, Michigan. He subsequently moved to Texas and ~~passed the Texas bar exam.~~ Judge Spenrath was licensed on May 10, 1991 and has a Texas bar number. However, his member status with the Texas Bar Association is “inactive” and he has never paid active bar dues or practiced law in this or any other state. Upon licensure in Texas, Judge Spenrath requested he be enrolled as an inactive member of the state bar.

III. RELEVANT LEGAL AUTHORITIES

“The state bar is composed of those persons licensed to practice law in this state.” TEX. GOV’T CODE § 81.051(a). Each person licensed to practice law in this state shall, not later

than the 10th day after the person's admission to practice, enroll in the state bar by registering with the clerk of the supreme court. TEX. GOV'T CODE § 81.051(b).

In Texas, there are four "classes" of membership in the state bar: active, inactive, emeritus, or associate. TEX. GOV'T CODE § 81.052(a). Each licensed member is an active member until the person requests to be enrolled as an inactive member. TEX. GOV'T CODE § 81.052(b). An inactive member is a person who (1) is eligible for active membership but not engaged in the practice of law in this state, and (2) has filed with the executive director and the clerk of the supreme court written notice requesting enrollment as an inactive member. TEX. GOV'T CODE § 81.052(b).

An inactive member may not practice law in this state, hold an office in the state bar, or vote in any election conducted by the state bar. TEX. GOV'T CODE § 81.053(a).

An inactive member of the bar who practices law commits a criminal offense. TEX. PEN. CODE § 38.123. Before engaging in the practice of law, an attorney must be "currently licensed" and in good standing with the state bar. TEX. PEN. CODE § 38.123(b).

The Court of Appeals in Amarillo has considered the effects of inactive bar membership in two related opinions that provide a minimal amount of guidance on the issue. In re Jones, 978 S.W.2d 648 (Tex. App.--Amarillo 1998, no pet.); Scolaro v. State ex rel. Jones, 1 S.W.3d 749 (Tex. App.--Amarillo 1999, no pet.). In Jones, the court of appeals denied mandamus relief on procedural grounds, but noted that *active* bar membership was required to satisfy the "licensed attorney" requirement of Texas Government Code Section 25.0014(3). Jones, 978 S.W.2d at 652-53. In Scolaro, a county judge subject to a *quo warranto* proceeding sought appeal of the order removing her from office based on the ineligibility noted in Jones. Scolaro, 1 S.W.3d at 753-59. Although the issues in Scolaro are quite different from those in the requested issue, the court of appeal's reliance on the provision that "an inactive member may not practice law in this state" is noteworthy. Id. at 756. Even though Scolaro claimed she was engaged in the practice of law, the date that she reactivated her law license was the decisive issue for the courts. Id. at 757.

IV. DISCUSSION

The Wharton County District Attorney's Office intends to aggressively prosecute DWI's. We believe the legislature intended for Article 18.01(i) and (j) to expand access to

evidentiary warrants for the purpose of obtaining evidence in breath test refusal cases. Specifically, Article 18.01(i) makes no refusal policies available to counties with fewer judicial resources than larger counties. Certainly, the statute doesn't contemplate the office of a constitutional county court judge being held by a judge with an inactive law license.

As an inactive member of the bar, the day before Judge Spenrath took the bench, he could not legally practice law, hold an office in the state bar, or vote in state bar elections. TEX. GOV'T CODE § 81.053(a). If he had been engaged in the practice of law, it would have been a criminal act. TEX. PEN. CODE § 38.123. Similarly, Judge Spenrath would have been ineligible to occupy the office of county court judge in any jurisdiction with a county court at law. TEX. GOV'T CODE § 25.0014(3). Only the peculiarities of the constitutional county court scheme make such a configuration of facts possible.

V. REQUEST FOR LEGAL OPINION

Finding no controlling authority, the Wharton County District Attorney's Office requests the Texas Attorney General issue an opinion with regard to this issue.