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October 13, 2005

RQ-0405-GA

Honorable Greg Abbott,
Attorney General of Texas
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for an Opinion concerning the application of House Bill 2036 and Chapter 110 of the Texas Occupations Code, as amended therein.

Dear Attorney General Abbott:

The Director of the Smith County Juvenile Services, Mr. Nelson Downing and the Honorable Floyd T. Getz, Juvenile Judge, Smith County Court at Law No.3 have asked that the Smith County Criminal District Attorney's Office request an Attorney General's Opinion regarding House Bill 2036 and Chapter 110 of the Occupations Code.

Questions:

What are the licensing requirements of Chapter 110 of the Occupations Code in consideration of the existing definitions found in section 110.001(7) and the newly amended sections 110.301 and 110.302?

What is the breadth of the definitions of Rehabilitation Service and Sex Offender found in sections 110.001(5) and 110.001(6) respectively, in light of the application of House Bill 2036?

Background:

Smith County Juvenile Services currently provide counseling to juveniles that enter the local juvenile justice system. Counseling for the juveniles is provided by: an individual who is a Licensed Psychologist and a Diplomat in Forensic Psychology; an individual who is a Licensed Clinical Social Worker and a Licensed Professional Counselor; an individual who is a Licensed Master Social Worker; an individual who is a Licensed Professional Counselor Intern; and an individual who is a graduate student at the University of Texas at Tyler.

Law:

Chapter 110 of the Occupations Code provides a definition of Rehabilitation Service which states:

“Rehabilitation service” means a mental health treatment or medical intervention program designed to treat or remedy a sex offender’s mental or medical problem that may relate or contribute to the sex offender’s criminal or paraphiliac problem.

TEX. OCC. CODE ANN. §110.001(5) (LEXIS through 2005 legislation). Chapter 110 of the Occupations Code also provides a definition of a Sex Offender which states:

“Sex offender” means a person who:
(A) is convicted of committing or adjudicated to have committed a sex crime under a state or federal law;
(B) is awarded deferred adjudication for a sex crime under state or federal law;
(C) admits to having violated state or federal law with regard to sexual conduct; or
(D) experiences or evidences a paraphiliac disorder as defined by the Revised Diagnostic and Statistical Manual, including any subsequent revision of that manual.

TEX. OCC. CODE ANN. §110.001(6) (LEXIS through 2005 legislation). In addition, Chapter 110 of the Occupations Code provides a definition of a Sex Offender Treatment Provider which states:

“Sex offender treatment provider” means a person, licensed or certified to practice in this state, including a physician, psychiatrist, licensed professional counselor, licensed marriage and family therapist, or social worker, who provides mental health or medical services for rehabilitation of sex offenders.

TEX. OCC. CODE ANN. §110.001(7) (LEXIS through 2005 legislation). Furthermore, Section 13 of House Bill 2036 amends Section 110.301 of Chapter 110 of the Occupations Code to read as follows:

License Required.

(A) a person may not provide a rehabilitation service or act as a sex offender treatment provider unless the person is licensed under this chapter.

(B) A person may not claim to be a sex offender treatment provider or use the title "sex offender treatment provider" or a similar title or an abbreviation that implies the person is a sex offender treatment provider unless the person is licensed under this chapter.

2005 Tex. Gen. Laws 1089.

Finally, the legislative history of HB 2036 provides a background and purpose for the legislation which states, in pertinent part:

Under current law, a person does not have to be registered with the Council on Sex Offender Treatment in order to provide treatment to sex offenders. As a result, there are no governing rules or a standard of practice in the treatment of sex offenders. The treatment of sex offenders is a very specialized area. It differs from traditional psychotherapy in that the treatment is mandated, confrontational, structured, victim centered, and the treatment provider imposes values and limits on the offender.

CSHB 2036 creates a protected practice of sex offender treatment providers to standardize training and treatment.

H. 79-C.S.H.B. 2036, Reg. Sess., at 1 (Tex. 2005).

Issues:

Licensing

The language of section 13 of HB 2036, as quoted above, requires that a person may not claim to be a sex offender treatment provider, or use such a title, unless the person is licensed under Chapter 110. See 2005 Tex. Gen. Laws 1089. Section 14 of HB 2036 then goes on to provide that Section 110.302 of the Occupations Code is amended to state, in pertinent part, "The council [on sex Offender Treatment] by rule shall develop procedures and eligibility and other requirements for issuance of a license under the chapter." *Id.* However, the current rules and regulations from the Council on Sex Offender Treatment do not reflect the amendments to Chapter 110 found in HB 2036. See 22 TEX. ADMIN. CODE §810.1-9 (LEXIS through 2005 legislation).

By way of example and as previously mentioned, Smith County currently receives the services of a Licensed Psychologist and Diplomat in Forensic Psychology. Under section 110.001(7) of

the Occupations Code, this individual will be a Sex Offender Treatment Provider. However, under the newly amended section 110.301 of the Occupations Code, this individual will not be able to refer to himself as a Sex Offender Treatment Provider. In the alternative, if the prerequisite licenses or certifications required to meet the definition of Sex Offender Treatment Provider in section 110.001(7) are considered a license under Chapter 110, the requirements of section 110.301 will be met without reaching an analysis under Section 110.302. An additional consideration however, is the plain language of the newly amended section 110.302, which seems to contemplate the *issuance* of a license by the Council on Sex Offender Treatment. Therefore, based on the foregoing, apparent conflicts exist in the language of section 110.001(7), section 110.301 and section 110.302.

Rehabilitation Service and Sex Offender

Further questions arise under the definitions of Rehabilitation Service and Sex Offender under Chapter 110. If a sex offender means a person who admits to having violated...[the] law with regard to sexual conduct (*See* §110.001(6)(C)), and a rehabilitation service means a...treatment or medical intervention designed to treat or remedy a sex offender's.... problem *that may relate or contribute* to the sex offender's....problem (*See* §110.001(5)), then a potential problem exists with non-sex offender counseling. For example, the language, "may relate to or contribute to the sex offender's problem" (*Id.*) is broad in scope, and because substance abuse may relate to or contribute to a sex offender's problem, an individual receiving substance abuse counseling, that admits to a past violation with regard to sexual conduct, would have to have the substance abuse counseling terminated until a sex offender treatment provider could take over.

A similar problem will arise under the language of section 110.001(6)(D). Again using the example of an individual receiving substance abuse counseling, if a sex offender means a person who experiences a paraphiliac disorder (*See* §110.001(6)(D)), a counselor providing non-sex offender counseling, who makes a diagnosis or receives evidence of a paraphiliac disorder, will have to terminate treatment until a sex offender treatment provider is available because substance abuse may relate or contribute to the sex offender problem.

Analysis:

Licensing

The newly amended Section 110.301 of the Occupations Code specifically states that a person may not provide a rehabilitation service or act as a sex offender treatment provider unless the person is licensed under this *chapter*. *See* 2005 Tex. Gen. Laws 1089. It does not state that a person must be licensed under this *section* (meaning section 110.301 of the Occupations Code). Furthermore, the legislative history of HB 2036 specifically states, as its purpose, its intention to create a protected practice of sex offender treatment providers to standardize training and treatment. *See* H. 79-C.S.H.B. 2036, Reg. Sess., at 1 (Tex. 2005). The legislative history does not state that its intent is to provide an exclusive licensing program, to the exclusion of other licensing as provided for in Section 110.001(7) of the Occupations Code. Based on the above analysis of the code sections and legislative history, and with

an absence of updated rules and regulations from the Council, it is the contention of Smith County that compliance with section 110.001(7) under Chapter 110 meets the requirements of newly amended section 110.003 of Chapter 110.

Rehabilitation Service and Sex Offender

The broad language of, "may relate or contribute" (*See* §110.001(5)), in the definition of Rehabilitation Service can be interpreted to mean *any* relationship or contribution to the sex offender's problem. Alternatively, the language can be read in the context of the of the entire definition, which would in turn allow discretion on the part of the counselors as to whether there is a relationship or contribution between the counseled behavior and the sex offender's sexual conduct. Furthermore, the latter interpretation would allow discretion as to whether continued counseling for non-sex offender problems (e.g substance abuse) is appropriate. It is the contention of Smith County that the latter interpretation should prevail. A counselor, as a licensed professional, must be able to use independent judgment and discretion. A practical application of the definition of Rehabilitation Service, when coupled with the possibility of an individual making an admission under section 110.001(6)(C) or a counselor making a diagnosis under section 110.001(6)(D), and subsequently becoming a Sex Offender, would require the exercise of judgment on the part of the counselor in order for counseling services to remain functional. Please note, if the proffered interpretation of the license requirements under Chapter 110 is correct, the majority of Smith County's counselors would qualify as Sex Offender Treatment Providers and this issue would become largely moot.

Request:

Based upon HB 2036, effective as of September 1, 2005, and further based upon the current credentials of counselors serving Smith County, together with the absence of revised rules and regulations by the Council on Sex Offender Treatment, the Smith County Criminal District Attorney's Office, on behalf of Smith County Juvenile Services and the Smith County juvenile justice system, would like to request an opinion from the Attorney General's Office regarding the language and effect of HB 2036 as it relates to the licensing requirements of Chapter 110 of the Occupations Code as well as the definitions of Rehabilitation Service and Sex Offender found in Sections 110.001(5) and 110.001(6).

Respectfully,



Michael B. Gary
Assistant Criminal District Attorney for Smith County