

Rule 2.110 Transfer of offenders under this compact

- (a) No state shall permit an offender who is eligible for transfer under this compact to relocate to another state except as provided by the Compact and these rules.
- (b) An offender who is not eligible for transfer under this Compact is not subject to these rules and remains subject to the laws and regulations of the state responsible for the offender's supervision.

Rule 2.105 Misdemeanants

(a) A misdemeanor offender whose sentence includes one year or more of supervision shall be eligible for transfer, provided that all other criteria for transfer, as specified in Rule 3.101, have been satisfied; and the instant offense includes one or more of the following—

- (1) an offense in which a person has incurred direct or threatened physical or psychological harm;
- (2) an offense that involves the use or possession of a firearm;
- (3) a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol;
- (4) a sexual offense that requires the offender to register as a sex offender in the sending state.

Rule 1.101 Definitions

"Temporary travel permit" means, for the purposes of Rule 3.108 (b), the written permission granted to an offender, whose supervision has been designated a "victim-sensitive" matter, to travel outside the supervising state for more than 24 hours but no more than 31 days. A temporary travel permit shall include a starting and ending date for travel.

"Travel permit" means the written permission granted to an offender authorizing the offender to travel from one state to another.

Rule 3.103 Reporting instructions; offender living in the receiving state at the time of sentencing

The sending state may grant a seven day travel permit to an offender who was living in the receiving state at the time of sentencing. Prior to granting a travel permit to an offender, the sending state shall verify that the offender is living in the receiving state.

42.12 Section 17

Change of Residence; Leaving the State

Sec. 17. (a) If, for good and sufficient reasons, a defendant desires to change his residence within the state, the change may be effected by application to the supervising supervision officer, which change shall be subject to the judge's consent and subject to such regulations as the judge may require in the absence of an officer in the locality to which the defendant is transferred.

(b) Any defendant who removes himself from the state without permission of the judge having jurisdiction of the case shall be considered a fugitive from justice and shall be subject to extradition as provided by law.

Kathie Winckler
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May 9, 2008

Mr. Harry Hageman
Executive Director
Interstate Commission for Adult Offender Supervision
2760 Research Park Dr.
Lexington KY 40578-1910

Re: Request for advisory opinion

Dear Harry:

As you know, the State of Texas has carried out an aggressive program of training for both the judiciary and the officials involved in supervision of Interstate Compact offenders. During this process areas of concern have been identified that could potentially impact the personal liability of judges and other supervisory officials in states across the nation. We feel that it is prudent to bring this to your attention, and we are, therefore, requesting that in your capacity as executive director of the Commission you render an advisory opinion on the following matters pursuant to the provisions of Rule 6.101 (c).

The matters in question are as follows:

1. Texas judges and probation officers¹ are hesitant to allow misdemeanor offenders who apparently do not fall under the Interstate Compact misdemeanor rule, Rule 2.105, to leave the State of Texas after these offenders are placed under supervision. The hesitance of these officials is based on their concern for their potential liability to injured parties should the offenders commit criminal acts that result in injury to third parties outside of Texas. Because Rule 2.105 has been interpreted to make only those offenders who have committed four specified types of misdemeanor offenses eligible for transfer under the Interstate Compact; and because Rule 2.110 (b) states that "[a]n offender who is not eligible for transfer under this Compact is not subject to these rules and remains subject to the laws and

¹ For purposes of offender supervision, probation officers are agents of the court.

regulations of the state responsible for the offender's supervision," a large class of misdemeanor offenders is created whose departure from Texas does not appear to be lawfully authorized under this interpretation of the Rules. This situation is particularly concerning because these misdemeanor offenders were excluded from eligibility for transfer under the misdemeanor rule because their offenses were considered to be less of a threat to public safety than the four categories of offense that were enumerated in Rule 2.105. That places the "less serious" offenders, e.g., first-time D.W.I.s or bad-check writers, in the odd position of bearing the heavier penalty of being unable to return to their home states or relocate during the term of their supervision than those who have transgressed more frequently or severely, e.g., second- or third-time D.W.I.s or domestic abusers. The judges must choose among keeping the offenders in Texas for the length of their supervision; assessing a fine rather than placing the offender under supervision, although the judge may feel supervision is warranted and is in the best interests of justice; or letting the excluded misdemeanant go to another state and risking potential personal liability for criminal acts of the offender.

2. Texas judges and probation officers are reluctant to issue travel permits to offenders who are not relocating but simply leaving the State of Texas for routine business travel, vacations, visits to family, medical appointments, and other such out-of-state travel normally undertaken in the activities of everyday life. Texas judges and probation officers clearly understand their obligation under the Compact to begin transfer proceedings on offenders who plan to leave Texas for more than 45 days. But neither the Compact nor its rules addresses out-of-state travel of offenders for 45 days or less except for those in victim-sensitive cases. There has been an increasing concern that judges and probation officers who issue travel permits for travel as described above to offenders who then commit a crime that results in injury to a third party in another state may be found liable for granting travel permits because no explicit authority exists in the Interstate Compact or its rules.
3. Parole officers in Texas are executive branch employees who supervise parolees under conditions imposed by the Texas Board of Pardons and Paroles, a group appointed by the Governor to decide whether and under what conditions inmates may be released from prison. Each parolee receives standard conditions of parole and may receive additional special conditions that the parole officer is required to enforce. The conditions may be silent, however, as to travel outside the State of Texas.

In recent weeks these questions have taken on a special urgency as several probation departments in Texas have adopted policies that they will not give

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travel permits to offenders under the circumstances described above. The Texas Interstate Compact Office has received an email from a defense attorney asking whether the "official position" of the office is that judges have no authority to issue travel permits and another stating that "a crisis is developing in Texas concerning the compact and the liability of judges." Today the Houston Chronicle, the state's most widely circulated newspaper, published an article by a columnist describing how a probationer who had only one DWI had a tougher time than an offender who had three DWIs or a felony. The article cited the Interstate Compact and a "glitch in federal law, as interpreted by a Texas assistant attorney general," and quoted the director of one of the largest counties in Texas as saying, "Currently the department is not issuing any travel permits out of state." A copy of this article is attached.

Because of the mounting difficulties caused by the concern and confusion about judges' and other officials' potential personal liability, we ask that you, in consultation with General Counsel Rick Masters, act in an expedited, informal manner to immediately determine whether the Interstate Compact, its rules, by-laws, advisory opinions or other acts affords the authority to allow judges and other supervisory officials to permit offenders as described above to travel outside of Texas. Following that action, we ask that you render an advisory opinion on the same matter to put to rest this area of great uncertainty and potential peril for judges and supervision professionals in all states.

If I can give you further information about these issues, please contact me. I look forward to hearing from you in the very near future.

Sincerely,

Kathie Winckler

Kathie Winckler
Commissioner
State of Texas

cc: Rick Masters, General Counsel, ICAOS
David Harris, Texas Ass't Attorney General,
Stuart Jenkins, Texas Parole Director, Compact Administrator
Regina Grimes, Texas Interstate Compact Office Director
Judge Larry Gist, Chair, Judicial Advisory Council
Steve Enders, Chair, Probation Advisory Committee
Mary Anne Wiley, Assistant General Counsel, Governor Rick Perry

Attachment: Houston Chronicle article, *Probation Tougher for 1 DWI Than 3*, May 9, 2008

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May 9, 2008
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Rick Casey

May 8, 2008, 11:02PM

COMMENTARY

Probation tougher for 1 DWI than 3

By RICK CASEY

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Texas can be a strange place.

Let's say you live in Pearland and you're on probation for your first DWI, a misdemeanor.

You were fired from your job, but your uncle has lined up employment for you in Oklahoma.

Your probation officer and the judge in your case agree that you are a good person who made a mistake. You've been meeting all the requirements of probation.

You've never been in trouble before and it looks as though you are unlikely to get in trouble again.

You will not get permission to move.

But if you are on probation for your second DWI? Or third DWI? Or a felony?

A judge may well say you're good to go.

Your mother's funeral

Likewise, if you are on probation for a misdemeanor during which you flashed a firearm, you may get to go. Without the firearm, no go.

Or you live in Alvin (or Fort Worth, for that matter) and you're on probation for any kind of crime, from shoplifting to murder, and your mother in Colorado dies. You want permission to make a two-day trip for the funeral.

You're out of luck.

But if you live a few miles north in Harris County, you'll get to pray over your mother's coffin unless a judge considers you a risk.

And chances are good a Harris County judge will let you move to Oklahoma for that job.

Fear of lawsuits

Is this because judges in Brazoria County are more mean-spirited than Harris County judges?

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No. The reason is a glitch in federal law, as interpreted by a Texas assistant attorney general.

The assistant AG, David Harris, reasons that the authority of Texas judges stops at the state line. Therefore, they have legal immunity only in regard to probationers who travel or move outside the state under the regulations of the Interstate Compact for Adult Offender Supervision.

The compact was drawn up by a commission set up by Congress, and ratified by the states. It saved each state from having to negotiate with 49 other states and a few territories.

The compact features no rules for travel of less than 30 days.

So Harris argues that since the compact doesn't authorize such travel, a judge exceeds his authority if he allows a probationer to travel outside Texas. If the probationer should rape or murder a few people, the judge can be sued personally.

As for "transfer," or moving to another state and coming under the supervision of its probation department, the compact lists four types of misdemeanors that are eligible for transfer if they meet other criteria.

They include offenses in which harm had either been threatened or caused, offenses involving possession of a firearm, second or subsequent DWIs and sexual offenses that require registration as a sex offender.

Harris County officials interpret the compact differently and continue to let probationers travel. But not officials in Tarrant and Brazoria counties.

Until recently, probation officers and judges had assumed that cases that didn't come under the compact meant "we can do whatever we want, including letting them go and having them mail in reports," wrote Tom Plumlee, Tarrant County adult probation director, in a memo to judges two weeks ago.

"Last week several judges and attorneys listened to Mr. Harris's presentation and while they did not like the ramifications of what he was saying they could not really disagree with him," he wrote.

As a result, he said, "Currently the department is not issuing any travel permits out of state."

Brazoria County officials south of Houston heard the same presentation and have responded the same way.

"Even if it's related to something that seems legitimate like a funeral or a family event we are not allowing any travel out of state," said Caroline Rickaway, Brazoria County's director of adult probation.

She said this can also be a problem if a probationer's job requires an occasional short trip.

Of course, she said, in some cases "we realize they are probably going to go. But we can't give them permission, and if they tell us they went we would have to tell the judge they violated their probation."

So it's a little bit crazy.

"DWI first-time offenders are not eligible to be transferred to another state," said Rickaway. "Subsequent DWI cases and felonies can be transferred. Low-risk offenders can't be."

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It can be fixed, and it doesn't take an act of Congress. Just a couple of committee hurdles and a vote of the Interstate Commission for Adult Offender Supervision. The next annual meeting is in September. Texas's representative on the commission, Kathie Winkler, should get right on it.

You can write to Rick Casey at P.O. Box 4260, Houston, TX 77210, or e-mail him at rick.casey@chron.com.

HOUSTON★CHRONICLE

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