

Myles K. Porter
District And County Attorney

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OPINION COMMITTEE

September 15, 2003

RQ-0106-GA

To: Attorney General Kirk Abbot
P.O. 12548
Austin, TX 78711
Attn: Nancy Fuller, Opinions committee

FILE # ML-43259-03
I.D. # 43259

From: Myles Porter, Fannin County Attorney

Questions presented:

- 1) May the county commissioners retain private counsel, on a salary basis, to advise them on legal matters without the express consent of the county attorney?**
- 2) May the county commissioners retain such private counsel and pay him or her, on a salary basis, from the road and bridge fund?**

Dear Attorney General Abbot;

For the past two-and-one-half years the Fannin County Commissioners have retained the services of a private attorney to advise the commissioners in legal matters. This private counsel has been paid on a salary basis, including benefits, from the general fund. Fannin County has a county attorney, no district or criminal district attorney, and thus has concurrent jurisdiction over felonies. See TEX. CONST. ART. 5 § 21; TEX. GOVT. C. §41.007. Specifically, the county attorney is required by law to "on request, ... give to a county or precinct official a written opinion or written advice relating to the official duties of that official," Tex. Govt. Code § 41.007. Further, "[t]he County Attorney shall represent the State in all cases in the District and inferior courts in their respective counties." TEX. CONST. ART. 5, §21. Recently the Fannin County Attorney advised the court that the county attorney does not condone the retention of this private counsel, and that the county attorney is able and willing to provide whatever legal advice

and services the court may require. The court has made known, that in light of the county's current budgetary situation, the court intends to retain said private counsel and pay his salary and benefits from the county's road and bridge fund.

The question presented is whether, in light of express constitutional and statutory assignments of duties, the commissioners' court may retain private counsel, paying him a salary and benefits, without the express consent of the duly elected county attorney, to advise the court on general legal matters. If they may, may such private counsel's salary and benefits be paid from the road and bridges fund?

A somewhat analogous situation was presented in *Guynes v. Galveston County et al.*, 861 S.W.2d 861 (Tex. 1993). There the Texas Supreme Court noted that "courts of this state have for the last century upheld the power of a commissioners' court to hire counsel to assist it or other officials in carrying out their responsibilities so long as the statutory duties of other county officials are not thereby usurped." *Guynes*, 861 S.W.2d at 863 (citations omitted). Further, "county and district attorneys are charged primarily with enforcement of the criminal statutes and, 'it is not one of their prescribed legal duties to represent the county in its general legal business or the conduct of ordinary civil actions.'" *Guynes*, 861 S.W.2d at 864, citing *Hill Farm, Inc. v. Hill County*, 425 S.W.2d 414, 419 (Tex. Civ. App. – Waco 1968), *aff'd.*, 436 S.W.2d 320 (Tex. 1969).

The distinction lies in the fact that Galveston County, in *Guynes*, had a criminal district attorney, which had statutorily replaced its county attorney. Further, there appears to have been an express consent by the criminal district attorney to the court's retention of the private counsel. *Guynes*, 861 S.W.2d at 864. In Fannin County's situation, there has been no consent from this office, nor has there been any legislative allotment of authority or duties. It seems clear, then, that the commissioners' court's


actions amount to an usurpation of this office's exclusive constitutional and statutory authority. See Tex. Atty. Gen. 1990, No. JM-1281, citing *Cameron County v. Rivera*, 761 S.W.2d 517 (Tex. App. – Corpus Christi 1988, no writ).

It appears that your office's predecessor has addressed this issue squarely: "It is our considered opinion that the law does not intend that the Commissioners' Court shall employ counsel on a salary basis to advise and represent it in whatever matters might arise." Op. Atty. Gen. 1946, No. 0-7474. See also Op. Atty. Gen. 1990, No. JM-1281 ("It has been consistently held that the commissioners['] court is not authorized to interfere with the county attorney's general statutory duty to advise and represent county and precinct officers.").

If, however, your office concludes that such acts by the commissioners' court is permissible as an exercise of the commissioners' court's discretion, may such retained counsel be paid a salary and benefits from the court's road and bridge fund? Such funding would seem to be precluded. See Tex. Atty. Gen. Op. 1978, No. H-1112.

Your office's input and opinion on these matters, in as expeditious manner as possible, would be greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Myles Porter", with a large, stylized flourish extending to the right.

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