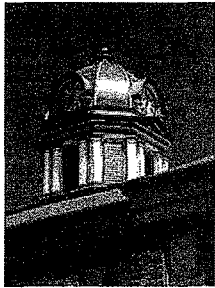


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OCT 06 2017



OPINION COMMITTEE *Office of the*
COUNTY ATTORNEY
KINNEY COUNTY, TEXAS

FILE # ML-48218-17
I.D. # 48218

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County Attorney

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RQ-0184-KP

Office of the Attorney General
Attn: Opinion Committee
P. O. Box 12548
Austin, TX 78711-2548

October 6, 2017

VIA EMAIL: opinion.committee@oag.texas.gov

REQUEST FOR OPINION

Dear Mr. Paxton:

As the County Attorney of Kinney County, Texas, I respectfully request an Attorney General Opinion from your office. The questions presented in this request are:

I.

Does the duty of a county attorney to provide written legal advice to county and precinct officials relating to their official duties extend to providing general legal advice to a private individual, at the request of a county official, as to state and local regulations that would apply to a contemplated private enterprise project that might be undertaken within the geographical area of the County and would be expected to benefit the County and its residents generally through increased economic activity and an addition to the ad valorem tax base?

II.

May a county attorney utilize his county office to provide, voluntarily and without charge, legal advice to a private individual with respect to such an enterprise, when the commissioners court

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From: Todd A. Durden, County Attorney

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has not permitted or authorized the County Attorney to use his county office in his private practice?

III.

If a county attorney properly has a private practice law office in addition to the county office, is there a legal requirement as to how much time the attorney must spend in the county office versus his private practice law office?

Propriety of Request

Discussion. As the County Attorney of Kinney County, Texas, I have the legal duties of a county attorney under Texas law,¹ and I am a “county prosecutor” within the meaning of Chapter 46. I am provided an office by Kinney County for conducting my official duties in the county courthouse located at the county seat of Brackettville.

Along with district attorneys, county attorneys are charged with the duty, on request, to give to a county or precinct official of his district or county a written opinion or written advice relating to the official duties of that official.² In order for my office to effectively and efficiently fulfill this duty, there is an office form that has been developed for such requests.

On October 3, 2017, I received the attached request. My concern is whether the document I received constitutes a request for advice relating to the official duties of the county official requesting it. I have not found legal authority to support the proposition that the duty to provide legal advice to a county or precinct official can be extended to require advice to be given to a

¹ Generally and for the most part these are described in article V section 21 of the Constitution, Chapter 2 of the Code of Criminal Procedure, Chapters 41, 45 and 46 of the Government Code, and Titles 3 and 4 of the Family Code. There are various other duties to be found throughout the Texas statutes (*e.g.*, Agriculture Code, Alcoholic Beverage Code, Business and Commerce Code, Business Organizations Code, Civil Practice and Remedies Code, etc.).

² Texas Government Code Sec. 41.007

third person.³ I do not believe it would be proper for me in my official capacity to provide valuable legal advice to a third person upon this request.⁴

Possibility of Alternative

Still, I understand the desire of the County Judge to provide a welcome atmosphere to private enterprises that might increase economic activity and add to the ad valorem tax base. Sharing in this goal, I might be inclined to provide some legal advice and guidance to this individual on a voluntary basis, without charge.⁵ As a county attorney, I am legally permitted to do so, as my salary from all state and county funds received is less than eighty percent (80%) of the benchmark salary as defined in Section 46.001(2). That is, my salary is less than \$112,000, and thus by statute I am permitted to augment my salary through the private practice of law. *See generally*, Tex. Att’y Gen. Op. No. GA-0094.

And as county attorney, my county office is in the county courthouse in Kinney County. My private practice office is presently located outside of the county, which is allowable under law. Tex. Att’y Gen. Op. No. GA-0094. To my knowledge, the commissioners court has not authorized the county attorney to use the county office for the conduct of a private practice. *See* Sec. 41.011, Tex. Att’y Gen. L. Op. No. 98-086. I have not found any legal authority to allow a county attorney to use the county office with respect to private practice clients absent authorization by the commissioners court in its discretion.

³ Indeed, Texas Government Code Sec. 41.007 seems to be very specific, using the term, “that official,” so that it would appear that one official is not entitled to written advice from a county attorney as to the duties of another official.

⁴ See generally, Article III, section 52 of the Constitution, which prohibits counties from using public funds “or thing of value” for private purposes.

⁵ Assuming, of course, the individual would accept the attorney advising him on that basis.

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Apparently, there is no distinction drawn on the basis of whether the clients pay the attorney or not.⁶ Thus, it would seem that I am unable to provide any legal advice to this third person from my county office, even on a voluntary basis without charge.

Physical Presence in County Offices

Finally, I have found no provision of law prohibiting a county attorney from conducting official business away from the county office while at home, or while at the private law practice office. It follows that a practical problem arises from the inability of the county attorney to use the county office for his or her private practice. While at the private office, if a matter of county business comes up, the county attorney can address it immediately. If, however, a private practice matter requires attention while the county attorney is in the county offices, the attorney has to leave the county office to go to the private office to tend to it. The inconvenience is minimal if the private office is nearby. But with a private office outside the county, the drive time is unproductive and expends valuable time. Of course, such interruptions to the workday cannot continue on an ongoing basis. The effect of these rules makes it more efficient for the county attorney to work from his private law office, where work assignments of both types can be completed. A county attorney having both public duties and private clients may spend more time in their private law office, even if they dedicate more of their overall time to their public duties there.

Avoiding such a situation appears to have been contemplated by the legislature in enacting section 41.011 of the Government Code in 1987. See, Tex. Att'y Gen. L. Op. No. 93-51. Then S.B. 748, the law's goal is to provide a

⁶ The ABA model rules use the term "represent" with respect to the formation of the client-lawyer relationship, as do the Texas rules, which also use the term employment in some passages. Compare, ABA Model Rules of Professional Conduct, Rule 1.1, Texas Disciplinary Rules of Professional Conduct, Rule 1.01. This appears to be a distinction without a difference, as remuneration is not cited in either rule as a prerequisite to the formation of a client-lawyer relationship. Whether a county attorney could be prohibited from using the county office while participating in qualifying pro bono activities is beyond the scope of this inquiry.

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county office that facilitates a county attorney's private practice. Senator Glasgow, sponsor of the bill, testified that Senate Bill 748 "makes clear that a district or county attorney, at the discretion of the county commissioners court, can use the county facilities, that is, office space, secretaries, and telephones, to practice private law." *Id.*, citing hearings on S.B. 748 Before the Senate Comm. on Criminal Justice, 70th Leg. (Apr. 21, 1987) (tape available from Senate Staff Services). The legislative history is replete with references to rural counties that benefit from this arrangement.

If, however, the County Attorney must repair to his private law office to perform legal services on private practice matters, the question arises: is there any requirement as to how much time the county attorney spends physically present in the county office, as opposed to time spent physically present at his private law office? I have not been able to find a number or a percentage, and request your opinion on this issue as well.

Thank you for your consideration of these questions and your assistance in answering them.

Sincerely,

Todd A.
Durden

Todd A. Durden
County Attorney

Digitally signed by Todd A. Durden
DN: cn=Todd A. Durden, o=County
Attorney, ou,
email=attorney@co.kinney.tx.us, c=US
Date: 2017.10.06 16:01:52 -0500

****redacted****

LEGAL ADVICE REQUEST

By County Or Precinct Official To Kinney County Attorney

Note: Texas Government Code Sec. 41.007 provides that a district or county attorney, on request, shall give to a county or precinct official of his district or county a written opinion or written advice relating to the official duties of that official. This form is to be used by county or precinct officials of Kinney County, Texas to request a written opinion or written advice from the county attorney. Please understand that this request is not private and is not privileged, but rather, is part of a public record.

From: [redacted]

Official Title: County Judge

Official Duties in Question: Legality of placing
A [redacted] in Kinney County

Background Facts: [redacted] called
and wants to know if any state rules/
ordinances that would prohibit/
allow him to do that?

His Phone - [redacted]

Legal Question or Advice Sought: WHAT ORDINANCES/LAWS/
rules apply to Mr [redacted]
request, if any.

Please Advise

[redacted signature]
Signature of Official

October 3, 2017
date

Received on behalf of Kinney County Attorney by: [redacted] on 10/3 /2017