

# DISTRICT ATTORNEY'S OFFICE

33<sup>rd</sup> & 424<sup>th</sup> Judicial Districts

COUNTIES OF

BLANCO • BURNET • LLANO • SAN SABA

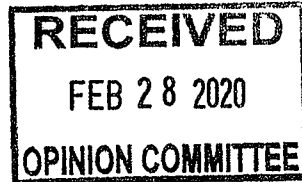
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February 28, 2020

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



RQ-0336-KP  
FILE # ML-48716-20  
ID.# 48716

Dear General Paxton:

Pursuant to 402.043 of the Texas Government Code, I request a written opinion on the following questions:

**Questions presented:**

- 1) When determining whether a county judge is entitled to the salary supplement provided in Texas Government Code Section 26.006(a), what is the appropriate method to calculate whether 40 percent of the functions performed are judicial functions? Is this calculation based on the time the judge spends in performing judicial functions as a percentage of the total *time* spent on his or her official duties, or on the *number* of judicial functions performed as a percentage of all official functions performed?
  - a. If entitlement to the salary supplement depends on the *time* spent on judicial functions as a percentage of the total time a county judge spends on all functions, what is the appropriate method of calculating time spent on all functions against which to measure time spent on judicial functions? Do "all functions" include time spent fulfilling duties for the benefit of the community outside of traditional business hours? Do "all functions" include a standard work year of 2,080 hours?
  - b. If entitlement to the salary supplement depends on the *number* of judicial functions performed as a percentage of the total number of functions performed, what is the appropriate method of calculating the total number of functions performed by a county judge, against which to measure their judicial functions?
- 2) What remedies are available to county or district attorneys, or other representatives of county or state government, if a county judge claims entitlement to the supplemental pay by submitting an affidavit falsely or erroneously claiming that 40 percent of his or her functions are judicial?

## Background:

Texas Government Code, Section 26.006(a) provides in relevant part, “A county judge is entitled to an annual salary supplement from the state in an amount equal to 18 percent of the annual compensation provided for a district judge in the General Appropriations Act if at least 40 percent of the functions that the judge performs are judicial functions.” The statute further provides in subparagraph (b), “To receive a supplement under Subsection (a), a county judge must file with the comptroller’s judiciary section an affidavit stating that at least 40 percent of the functions that the judge performs are judicial functions.”

A group of citizens filed a complaint with the 33<sup>rd</sup>/424<sup>th</sup><sup>1</sup> Judicial District Attorney’s Office concerning Burnet County Judge James Oakley receiving a state salary supplement provided in the Texas Government Code. The complaint alleged that, as a non-lawyer that did not handle contested matters, it was not possible for Judge Oakley to have spent 40 percent of his time as county judge on “judicial functions” and therefore, he was not entitled to the salary supplement. A review of opinions rendered by the Office of the Attorney General in reference to this issue included Attorney General Opinion KP-0090 which addressed activities qualifying as “judicial functions.” However, that request for opinion, and the responsive opinion did not address how the percentage of “judicial functions” should be calculated. Detailed factual information, including examples of time estimated in judicial functions, has been included in this request in order to obtain an opinion and guidance on the calculation of the percentage of judicial functions as well as remedies if the 40 percent threshold contained in Tex. Gov. Code §26.006(a) is not met.

Judge Oakley took office as the Constitutional County Court Judge<sup>2</sup> on January 1, 2015, and currently holds that position. He hears only uncontested probate matters and refers contested probate matters to the statutory county court at law judge.

The annual compensation for a district judge during the years 2015-2019 was \$140,000.<sup>3</sup> Therefore, the annual salary supplement for a county court judge who affirms by affidavit that 40 percent of his functions as a county judge are “Judicial Functions” is \$25,200.00. Affidavits have been filed by Judge Oakley each year beginning in 2015 to support his request for the \$25,200 supplemental pay from the Comptroller’s Office. There is no remedy provided in Tex. Gov. Code §26.006 when a judge files an affidavit claiming that 40 percent of his functions are judicial functions when the affidavit is not accurate.

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<sup>1</sup> The 33<sup>rd</sup> and 424<sup>th</sup> Judicial Districts have concurrent jurisdiction in Blanco, Burnet, Llano, and San Saba Counties.

<sup>2</sup> The County Court Judge is the presiding officer of the county court, and has judicial functions as provided by law. The position is provided for in Article V, §16 of the Texas Constitution and the judge in that position is sometimes referred to as the constitutional county judge. Statutory county courts are created by the legislature and the powers and duties of the Statutory County Court at Law Judges are set out in Chapter 25 of the Texas Government Code. The judge of a statutory county court does not have general supervisory control or appellate review of the commissioners court. Tex. Gov. Code §25.004(f).

<sup>3</sup> See Texas General Appropriations Acts 2014-2015 through 2020-2021 in Schedule of Exempt Positions: District and Criminal District Judges.

## **Inquiry of the Comptroller's Office**

Attorney General Opinion KP-0090 provides, "To the extent that a county auditor has concerns regarding an improperly requested salary supplement under Government Code 26.006(a), the auditor should confer with the Comptroller of the Public Accounts regarding disbursing the supplement." The Chief Investigator for the District Attorney contacted the Comptroller's Office to determine how the supplement for county court judges was verified in terms of whether the 40 percent judicial functions threshold had been met. Specifically, the District Attorney's Office requested whether the 40 percent determination was tracked by actual work hours or time spent on the bench or in hearings. Additionally, the District Attorney's Office investigator inquired as to whether any specific entity was tasked with tracking the time spent by county judges requesting the supplement.

The Comptroller's Office responded that that office did not question the affidavits submitted by county court judges. If a judge submitted an affidavit, the Comptroller's Office issued the supplemental pay. The Comptroller's Office expressed that control over payment of the supplement was "county business" and not "state business."

The Legislative Budget Board's April 2019 report, "Improve Oversight of the Texas County Judge Salary Supplement" on page one related the following:

Although the State Auditor's Office has authority to audit county judge salary supplements, supplements are unlikely to be audited due to the low amount of individual payments. No audits have been performed. Moreover, neither the Comptroller of Public Accounts nor the Office of Court Administration has audit authority. Therefore, the state has limited oversight to ensure that [sic] are distributed to recipients who meet statutory requirements."<sup>4</sup>

The conclusion of that portion of the District Attorney's Office investigation was that there is no state agency or body that monitors or verifies the 40 percent judicial function requirement of §26.006(a) of the Government Code.

## **Interview with County Judge James Oakley**

The District Attorney advised Judge Oakley of the complaint, and Judge Oakley was interviewed as to his functions as county judge. Judge Oakley advised that he only performed uncontested judicial functions which included uncontested probate cases including both dependent and independent administrations, receiverships for the estate resulting from probate, and guardianships related to probate. Additionally, Judge Oakley conducts hearings on Muniment of Title. Judge Oakley provided that contested cases are forwarded to the statutory county court at law judge of Burnet County. Judge Oakley further provided that he did not keep a log of the

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<sup>4</sup> The LLB report section is cited in the Order on December 27, 2019, by the 78<sup>th</sup> Judicial Court in cause number DC78-CR 2019-0428 dismissing a Court of Inquiry into the state salary supplement of the County Judge of Wichita County, TX. That order is quoted above regarding lack of oversight of the supplement payments. The LLB report can be found at:  
[http://www.ibb.state.tx.us/Documents/Publications/Staff\\_Report/2019/4750\\_County\\_Judge\\_Salary\\_Supplement.pdf](http://www.ibb.state.tx.us/Documents/Publications/Staff_Report/2019/4750_County_Judge_Salary_Supplement.pdf).

time spent on each case, nor could he accurately estimate how much time he spent on the cases because each varied. He did state that he spent time preparing for the hearings outside of court as well as the time spent in court. When asked for an estimate of the time he spent outside of court preparing for cases, he stated he spent approximately an hour a week outside of court preparing for the hearings he conducted and a maximum of 2 hours a week. However, Judge Oakley asserted that "time" involved in functions was not the proper measurement of the "40 percent" necessary to obtain the supplement. Rather, he asserted it was the "number" of functions performed by the county judge that was determinative of whether he was entitled to the \$25,200 supplement paid by the Comptroller's Office. Judge Oakley's perspective on this issue is presented later in the section labelled "Number of Functions Performed v. Time Spent on Functions."

### **Hearings Related to Judicial Function and Estimate of Time Spent**

The county court records of hearings scheduled for Judge Oakley to hear the various judicial functions he performs was reviewed to obtain the following data. As previously mentioned, Judge Oakley hears only uncontested matters concerning probate and probate related matters including the following: 1) independent administrations, 2) dependent administrations, 3) guardianships, and 4) muniment of title. During 2019 there were two hearings labelled "other."<sup>5</sup> The purpose of the review was to estimate the amount of time to conduct the hearings in each one of the judicial functions identified. Additionally, other former and current constitutional county court judges, statutory county court judges, and attorneys that regularly practice in the area of probate were interviewed. For purposes of the determination of time spent on judicial functions, 1 hour for each matter was considered to be adequate to include the hearing and notices sent for each hearing.<sup>6</sup>

#### **Hearings:**

Judge Oakley began hearings on the above-mentioned matters in 2015, and records of the Burnet County Clerk revealed that Judge Oakley scheduled<sup>7</sup> the following hearings:

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<sup>5</sup> See Burnet County Cause Numbers P10478 and P10798.

<sup>6</sup> On occasion when several hearings were scheduled on the same day independent administrations would be scheduled fifteen minutes apart. Sometimes the hearings were set farther apart. Additionally, in speaking with other county judges, clerks that had attended hearings, and lawyers practicing in areas of probate, the general belief among these groups was that 15 minutes would be adequate to handle a hearing on most uncontested matters. Additionally, including the time involved in sending notices, an hour for each matter would be more than adequate. Preparation outside of court was minimal, if any, according to most of the persons interviewed. However, to provide a fair analysis, each judicial hearing set was counted as requiring one hour although often scheduled at 15-minute intervals. Additionally, two hours were included in the calculations each week for preparation pursuant to Judge Oakley's "maximum" estimate of time required outside of court.

<sup>7</sup> The hearings included in the estimate for this request included all hearings "scheduled" rather than all hearings actually "conducted." Some participants in the process of the judicial hearings stated that oftentimes hearings would be scheduled but not actually held for one reason or another. However, to estimate the possible number of performed duty hours, it was calculated as if each scheduled hearing required an hour to complete notices and the hearing itself.

## **2015**

Uncontested probate with independent administration - 149  
Uncontested probate with dependent administration – 3  
Guardianships for the estate – 6  
Muniment of title – 57  
Total hearings scheduled for 2015 – 215

## **2016**

Uncontested probate with independent administration - 123  
Uncontested probate with dependent administration – 7  
Guardianships for the estate – 3  
Muniment of title – 49  
Total hearings scheduled for 2016 – 182

## **2017**

Uncontested probate with independent administration - 119  
Uncontested probate with dependent administration – 3  
Guardianships for the estate – 4  
Muniment of title – 23  
Total hearings scheduled for 2017 - 149

## **2018**

Uncontested probate with independent administration - 172  
Uncontested probate with dependent administration – 1  
Guardianships for the estate – 7  
Muniment of title – 34  
Total hearings scheduled for 2016 – 214

## **2019**

Uncontested probate with independent administration - 134  
Uncontested probate with dependent administration – 2  
Guardianships for the estate – 7  
Muniment of title – 32  
Other uncontested probate proceedings - 2  
Total hearings scheduled for 2019 – 177

### **Calculating Time Spent Performing Judicial Functions**

The Texas Government Code provides in Section 26.006(a) “A county judge is entitled to an annual salary supplement from the state in an amount equal to 18 percent of the annual compensation provided for a district judge in the General Appropriations Act if at least 40 percent of the functions that the judge performs are judicial functions.” However, the Government Code does not clarify how the 40 percent of functions is to be computed, nor whether that 40 percent consists of “time” spent on functions, or “number” of functions performed. Additionally, there is no requirement that an elected official, such as a county judge, has a specified work week from which to calculate the percentage of judicial functions.

The statute fails to provide any requirements for logging time in judicial functions to qualify for the supplement. The statute providing for the supplement also fails to provide a remedy if there is a request for the \$25,200 supplement and there is a failure by the county judge to comply with the requirements of §26.006(a).

In discussing the statute with the county judge he asserted the “number” of functions was the proper measurement to determine the 40 percent requirement rather than the “time” spent in functions.<sup>8</sup> Additionally, Judge Oakley urged that measuring functions performed in “time” would not account for the additional functions he voluntarily engages in for the benefit of the county that increase the number of hours he actually works. For example, if you based the calculation of 40 percent of functions performed on the actual time worked, county judges would be discouraged from going to events after hours or on weekends, because the additional time would increase the base number of hours worked. For example, if a judge worked 40 hours a week, and his judicial functions took up 16 hours a week, those 16 hours would constitute 40 percent of his “time” in judicial functions. However, if the judge were to participate in events that included 5 hours in the evening and 5 hours on a Saturday, then his “work” hours would be 50 hours and it would take 20 hours of actual time to reach the 40 percent requirement. Using the actual hours in “all functions” performed would discourage county judges from engaging in those additional functions which benefit the county and its citizens in Judge Oakley’s perspective.

Although there is no constitutional or statutory provision for elected officials to work a specific number of hours per week, for demonstrative purposes, a standard work week of 40 hours was used to calculate percentages in this request. A standard work week of 40 hours results in a standard work year of 2,080 hours.<sup>9</sup> Additionally, assuming the judge’s preparation time, time spent on notices, and times for hearing including up to 2 hours a week outside of work and one hour for each hearing as based on information obtained from the county judge, the following estimates of time were determined:

### 2015

215 scheduled hearings for a total of 215 hours of hearing and notice time.

104 hours for judicial function prep time.

319 hours total time estimated spent on judicial functions.

Using the 2,080 hour work year as a standard, the estimate of 319 hours spent on judicial functions would result in a calculated percentage as follows:  $319 \text{ total hours} / 2,080 \text{ hours in a standard work year} = 15.34 \text{ percent}$ , which is approximately 24.66 percent short of the 40 percent necessary to qualify for the monetary supplement.

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<sup>8</sup> The Study on the Adequacy and Appropriateness of Additional Compensation Paid to Certain County Judges as Directed by Senate Bill 1080, 83<sup>rd</sup> Legislature of November 1, 2014 referenced the affidavit to which county court judges must swear in order to receive the supplement. That report provides on page 13, “Each year a county judge must sign an affidavit certifying they spend at least 40% of their *time* performing judicial duties to receive the supplement. (Emphasis added.) The study cited Government Code §26.006(a) without elaboration of why the Senate study referenced “time” as the measurement of the 40% judicial functions.

<sup>9</sup> The standard work year assumes a 40-hour work week for 52 weeks a year which is 2,080 hours. Forty percent of the standard work year would be  $.40 \times 2,080 \text{ hours} = 832 \text{ hours}$ . Using the standard work year as a base, the hours spent on judicial functions divided by the standard work year would yield the actual percentage of time spent on judicial functions in a standard work year.

## 2016

182 scheduled hearings for a total of **182** hours

**104** hours for judicial function prep time.

**286** hours total time spent on judicial functions.

Using the 2,080 hour work year as a standard, the estimate of 286 hours spent on judicial functions results in a calculated percentage as follows:  $286/2,080$  or **13.75 percent**, which is approximately 26.25 percent short of the 40 percent necessary to qualify for the monetary supplement.

## 2017

149 scheduled hearings for a total of **149** hours

**104** hours for judicial function prep time.

**253** hours total time spent on Judicial functions.

Using the 2,080 hour work year as a standard, the estimate of 253 hours spent on judicial functions results in a calculated percentage as follows:  $253/2,080$  or **12.16 percent**, which is approximately 27.84 percent short of the 40 percent necessary to qualify for the monetary supplement.

## 2018

214 scheduled hearings for a total of **214** hours

**104** hours for judicial function prep time.

**318** hours total time spent on judicial functions.

Using the 2,080 hour work year as a standard, the estimate of 318 hours spent on judicial functions would result in a calculated percentage as follows:  $318/2,080$  or **15.29 percent**, which is approximately 24.71 percent short of the 40 percent necessary to qualify for the monetary supplement.

## 2019

177 scheduled hearings for a total of **177** hours

**104** hours for judicial function prep time.

**281** hours total time spent on judicial functions.

Using the 2,080 hour work year as a standard, the estimate of 281 hours spent on judicial functions would result in a calculated percentage as follows:  $281/2,080$  or **13.51 percent**, which is approximately 26.49 percent short of the 40 percent necessary to qualify for the monetary supplement.

## Number of Functions Performed v. Time Spent on Functions

Judge Oakley asserted it is the *number* of judicial functions performed that determines the qualification for the supplement rather than the *time spent* performing those functions. However, the statute does not specify how 40 percent of judicial functions is computed. Judge Oakley claimed two different methods to justify receipt of the monetary supplements. First, he provided he has two functions - administrative and judicial. According to the judge, 50 percent of his functions are judicial as there are only judicial and administrative functions.

The judge's rationale for a percentage of judicial functions does not appear to be accurate pursuant to Attorney General Opinion KP-0090 which provides the duties of commissioners

courts include aspects of legislative, executive, administrative, and judicial functions. Additionally, it would be meaningless for a statute to require 40 percent of the functions of a county judge to be judicial functions in order to qualify for the supplement if the legislature had contemplated functions by judicial or administrative “categories” rather than individual functions. Extending that logic, every county judge in Texas who exercised any criminal or civil jurisdiction would qualify for the supplement with 50 percent of their functions being judicial. When asked to enumerate his functions other than judicial functions, Judge Oakley referred the District Attorney’s Office to review the Texas Association of Counties (TAC) website for the various administrative functions a county judge performs. Therefore, when reviewing the TAC website and the 2018 Guide to County Officials (<https://www.county.org/TAC/media/TACMedia/About%20Texas%20Counties/Guide-to-Laws-2018.pdf>) the general administrative duties are delineated on pages 71-72. Not all of the general duties listed in that guide, however, apply to each county judge because duties differ depending on population and other restrictions. Therefore, computing the actual *number* of non-judicial functions Judge Oakley performs would be difficult to quantify and evaluate for determination of whether a salary supplement under the Government Code is justified.<sup>10</sup>

### **Remedies for Non-Compliance with §26.006(a)**

Texas Government Code provides no explicit remedy by county or state government for a county judge who receives a supplement, yet does not meet the 40 percent judicial function requirement.

### **Questions Concerning Justification of Salary Supplement**

Based on the facts, law, and estimates provided above, I request answers to the following questions related to the salary supplement provided under the Texas Government Code §26.006(a).

The questions presented are as follows:

- 1) When determining whether a county judge is entitled to the salary supplement provided in Texas Government Code Section 26.006(a), what is the appropriate method to calculate whether 40 percent of the functions performed are judicial functions? Is this calculation based on the time the judge spends in performing judicial functions as a percentage of the total time spent on his or her official duties, or on the number of judicial functions performed as a percentage of all official functions performed.
  - a. If entitlement to the salary supplement depends on the *time* spent on judicial functions as a percentage of the total *time* a county judge spends on all functions, what is the appropriate method of calculating time spent on all functions against which to measure time spent on judicial functions? Do “all functions” include

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<sup>10</sup> Focusing on the *number* of administrative functions versus judicial functions also fails to take into account the legislative and executive functions of a constitutional county judge in calculating the percentage of judicial functions of the judge. See Attorney General Opinion KP-0090, page 2 concerning functions of the county commissions court.

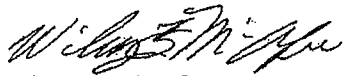


time spent fulfilling duties for the benefit of the community outside of traditional business hours? Do "all functions" include a standard work year of 2,080 hours?

- b. If entitlement to the salary supplement depends on the *number* of judicial functions performed as a percentage of the total *number* of functions performed, what is the appropriate method of calculating the total number of functions performed by a county judge, against which to measure their judicial functions?
- 2) What remedies are available to county or district attorneys, or other representatives of county or state government, if a county judge claims entitlement to the supplemental pay by submitting an affidavit falsely or erroneously claiming that 40 percent of his or her functions are judicial?

I appreciate your assistance in this matter.

Sincerely,



Wiley B. McAfee  
District Attorney  
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