KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 7, 2019

The Honorable Sarah Davis
Chair, Committee on General Investigating & Ethics
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0227

Re: Whether a state legislator may simultaneously serve as president of a municipal management district operating under chapter 375 of the Local Government Code (confirmation and clarification of Attorney General Opinion GA-0386) (RQ-0229-KP)

Dear Representative Davis:

You ask multiple questions regarding a state legislator's dual service as a legislator and as the president of a municipal management district.[1] You first ask whether Attorney General Opinion GA-0386 is still the correct interpretation of existing law. *See* Request Letter at 1; *see also* Tex. Att'y Gen. Op. No. GA-0386 (2005). Attorney General Opinion GA-0386 concluded that article XVI, section 40(d) of the Texas constitution prohibits an employee of a municipal management district operating under chapter 375 of the Local Government Code from simultaneously serving as a member of the Texas Legislature. *See* Tex. Att'y Gen. Op. No. GA-0386 (2005) at 5; *see also* TEX. LOC. GOV'T CODE §§ 375.001–.357 (providing for municipal management districts). The opinion also concluded that article XVI, section 40(d) did not apply to an independent contractor of a municipal management district. *See* Tex. Att'y Gen. Op. No. GA-0386 (2005) at 5.

Article XVI, section 40(d), provides, in relevant part, that "[n]o member of the Legislature of this State may hold any other office or position of profit under this State . . . ." TEX. CONST. art. XVI, § 40(d). While no Texas court has addressed the meaning of "position of profit," prior opinions of this office construe the phrase to mean "a salaried, nontemporary employment." Tex. Att'y Gen. Op. Nos. GA-0386 (2005) at 2, H-1304 (1978) at 2; *see also* Tex. Att'y Gen. Op. No. JC-0430 (2001) at 1 (distinguishing an "office" from a "position of profit"). Additionally, prior attorney general opinions construing the phrase "under this State" apply it to "employees of state agencies and of political subdivisions which can be characterized as agencies of the state." Tex. Att'y Gen. Op. No. JM-782 (1987) at 5; *see also Orndorff v. State*, 108 S.W.2d 206, 209 (Tex. Civ. App.—El Paso 1937, writ ref'd) (concluding that a political subdivision in a subordinate position to the State performing duties imposed by the State is "under this State"); TEX. LOC.

[1] *See* Letter from Honorable Sarah Davis, Chair, House Comm. on Gen. Investigating & Ethics, to Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (Apr. 30, 2018), https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

GOV'T CODE § 375.001(a) (stating a municipal management district is "essential to the accomplishment" of purposes under the Texas constitution). Accordingly, employees of a municipal management district, as a political subdivision of the State, hold a position of profit "under this State." *See* Tex. Att'y Gen. Op. No. GA-0386 (2005) at 2; *see also Orndorff*, 108 S.W.2d at 209. No judicial or attorney general opinion since Opinion GA-0386 changed these principles. If the president of a municipal management district is a nontemporary, salaried employee of the district, he or she is prohibited by article XVI, section 40(d) from simultaneously serving as a legislator. Whether an individual who carries the title of president and receives a regular monthly payment holds a position of profit is a fact question not appropriate for an attorney general opinion. *See* Tex. Att'y Gen. Op. No. GA-0087 (2003) at 1 ("whether a public servant's outside employment creates a conflict of interest frequently requires resolving fact questions, which is beyond the purview of the opinion process").

Prior opinions of this office concluded that article XVI, section 40(d) does not extend to an independent contractor. *See* Tex. Att'y Gen. Op. Nos. JC-0430 (2001) at 2, H-1304 (1978) at 2, Tex. Att'y Gen. LO-93-31 (1993) at 2. No judicial or attorney general opinion since Opinion GA-0386 has determined otherwise. Accordingly, an independent contractor is not prohibited by article XVI, section 40(d) from simultaneously serving as a state legislator. An independent contractor is one who, "in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details." *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598, 602–03 (Tex. 1961). Whether a person acts as an independent contractor depends on the amount of control that the employer exerts or has a right to exert over the details of the work. *See Newspapers, Inc. v. Love*, 380 S.W.2d 582, 591 (Tex. 1964). Regarding an employee, an employer controls both the end sought to be accomplished and the means and details of the accomplishment. *See Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002). A person who retains an independent contractor controls the end sought to be accomplished, while the independent contractor controls the means and details of accomplishing the work. *See id.*

The question whether an individual is an independent contractor is complex and does not allow for a uniform test: it arises in many varied contexts, and each of the different contexts can give rise to a different test by which to analyze the question. *See, e.g.*, *Harris Cty. Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 118–19 (Tex. 2017) (considering common-law test, as well as twenty-factor test established by the Workforce Commission); TEX. CIV. PRAC. & REM. CODE § 95.003 (providing factors to determine independent contractor in tort liability context). No judicial opinion or statute provides a uniform test to be used in the context of article XVI, section 40(d). Opinions from this office often refer to a five-factor test set out by the Texas Supreme Court. *See* Tex. Att'y Gen. Op. No. GA-0386 (2005) at 3–4, Tex. Att'y Gen. LO-95-022 (1995) at 1–2 n.2. The Texas Supreme Court recognizes that other tests exist, but it considers the following five-factor test an essential test by which to establish the right to control:

> (1) The independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except about final results; (4) the time for

> which the worker is employed; and (5) the method of payment, whether by unit of time or by the job.

Limestone Prods. Distrib., 71 S.W.3d at 312; *Indus. Indem. Exch. v. Southard*, 160 S.W.2d 905, 907 (Tex. 1942).

Absent a contract establishing the right to control, "right of control is necessarily determined as an inference from . . . facts and circumstances." *Producers Chem. Co. v. McKay*, 366 S.W.2d 220, 226 (Tex. 1963). Given the fact-intensive nature of the right-to-control determination, it is unlikely that a mere affirmation by an interested person claiming it, or a joint recital of a statement that a person is an independent contractor will alone suffice. *See generally Thompson v. Travelers Indem. Co.*, 789 S.W.2d 277, 279 (Tex. 1990) (examining fact circumstances to determine existence of employer-employee relationship); *Southard*, 160 S.W.2d at 907. As a practical matter, a state agency or unit of government could at a minimum utilize this five-factor test along with supporting fact findings to determine independent contractor status for purposes of article XVI, section 40(d).

You also ask whether other statutory or constitutional provisions "prohibit the described employment or the receipt by the legislator of compensation for both positions." Request Letter at 2. Generally, a state legislator "may accept a fee for work performed in a capacity other than as a legislator." Tex. Ethics Comm'n Op. No. 371 (1997) at 1 (citing TEX. PENAL CODE § 36.10(a)(1),[2] Tex. Ethics Comm'n Op. Nos. 358 (1997) at 2, 178 (1993) at 1). There are, however, statutory limitations on a legislator's private employment. For example, chapter 572 of the Government Code, which expressly applies to state legislators, governs standards of conduct and conflicts of interest of state officers and employees. *See* TEX. GOV'T CODE §§ 572.001–.069; *see also id.* § 305.022(a), (b) (providing that compensation for lobbying activities must not be made contingent on the outcome of administrative actions). Chapter 572 recites the State's policy that a state officer "may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's . . . duties in the public interest." *Id.* § 572.001(a). A state legislator's dual service could implicate several sections of chapter 572 depending on the circumstances. *See* Tex. Att'y Gen. Op. No. KP-0226 (2019) at 2–3.

Section 572.051 prohibits a state officer or employee from accepting "other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties." TEX. GOV'T CODE § 572.051(a)(3). It also provides that a state officer should not "intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's . . . official powers or performed the officer's . . . official duties in favor of another." *Id.*

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[2]Penal Code section 36.10(a)(1) provides that provisions regarding gifts to public servants do not apply to "a fee prescribed by law to be received by a public servant or any other benefit to which the public servant is lawfully entitled or for which he gives legitimate consideration in a capacity other than as a public servant." TEX. PENAL CODE § 36.10(a)(1). The exception for work performed in a nonpublic capacity "means that it must be the services rendered and not the status of the public servant rendering the services that is of value to the person for whom the services are performed." Tex. Ethics Comm'n Op. No. 416 (1999) at 1; Tex. Att'y Gen. Op. No. GA-0087 (2003) at 4.

§ 572.051(a)(5). The Commission recognizes that compliance with the standards of conduct in section 572.051 is a matter of personal ethics. *See* Tex. Ethics Comm'n Op. Nos. 371 (1997) at 1, 228 (1994) at 2 n.2. It advises a member of the Legislature, before entering into a contract, to consider "whether there is any conflict, or appearance of conflict, between the legislator's responsibilities as a public servant and his or her private contractual obligations" and to refrain from business activities that create a conflict or the appearance of such a conflict. Tex. Ethics Comm'n Op. Nos. 374 (1997) at 1, 408 (1998) at 1.

Section 572.053 prohibits a member of the Legislature from voting "on a measure or a bill, other than a measure that will affect the entire class of business entities, that will directly benefit a specific business transaction of a business entity in which the member has a controlling interest." TEX. GOV'T CODE § 572.053(a),[3] (b) (defining "controlling interest"); *see also* TEX. CONST. art. III, § 22 ("A member who has a personal or private interest in any measure or bill, proposed, or pending before the Legislature, shall disclose the fact to the House, of which he is a member, and shall not vote thereon."). In an independent contractor relationship, the terms of the contract would likely determine whether the legislator has a controlling interest. *See* Tex. Att'y Gen. Op. No. GA-1081 (2014) at 3 n.3 (stating that attorney general opinions do not construe contracts).

Section 572.056 provides that a "state officer may not solicit or accept from a governmental entity a commission, fee, bonus, retainer, or rebate that is compensation for the officer's personal solicitation for the award of a contract for services or sale of goods to a governmental entity." TEX. GOV'T CODE § 572.056(a). A "governmental entity" includes political subdivisions such as the municipal management district. *Id.* § 572.056(c). To the extent a contract between the municipal management district and the legislator provides for a commission, fee, bonus, retainer, or rebate as compensation for the legislator's personal solicitation for the award of a contract for services or sale of goods to the municipal management district, the compensation would be prohibited.

Provisions of the Penal Code may also apply. Chapter 39 provides for offenses related to the abuse of office. *See* TEX. PENAL CODE §§ 39.02 (abuse of official capacity), .03 (official oppression), .06 (misuse of official information). Chapter 36 pertains to bribery and corrupt influence. *See id.* §§ 36.02 (bribery), .07 (acceptance of honorarium), .08 (gift to public servant by person subject to his jurisdiction).

As a violation of these provisions is determined based on relevant facts, it is not for an attorney general opinion to conclude whether the employment you describe is prohibited. *See* Tex. Att'y Gen. Op. No. GA-0087 (2003) at 1 ("whether a public servant's outside employment creates a conflict of interest frequently requires resolving fact questions, which is beyond the purview of the opinion process"). As this office does not answer fact questions or determine whether violations of criminal statutes have occurred, we cannot determine whether this particular dual service violates chapter 572 or provisions of the Penal Code. *See* Tex. Att'y Gen. Op. No. GA-0760 (2010) at 3 ("Whether particular conduct constitutes a violation of a criminal statute involves

[3]An offense under this subsection is a Class A misdemeanor. *See* TEX. GOV'T CODE § 572.053(c).

questions of fact that are outside the purview of the opinion process."). Instead, the Commission[4] is authorized to bring civil charges for an alleged violation of these provisions, and a local prosecutor may bring any criminal charges warranted by particular circumstances. *See* TEX. GOV'T CODE §§ 572.007, .008.

[4]The Commission also has jurisdiction to prepare a written opinion about the application of chapter 572 "in regard to a specified existing or hypothetical factual situation." *Id.* § 571.091(a).

SUMMARY

To the extent the president of a municipal management district is a nontemporary, salaried employee of the district, he or she is prohibited by article XVI, section 40(d) of the Texas constitution from also serving as a state legislator.

Article XVI, section 40(d) does not prohibit an individual who works as an independent contractor from also serving as a state legislator. The Texas Supreme Court's right-to-control test to determine whether an individual is an independent contractor is fact intensive, and a mere affirmation or joint statement without factual support is likely insufficient to establish an individual as an independent contractor.

Though generally a state legislator may accept a fee for work performed in a capacity other than as a legislator, provisions in chapter 572 of the Government Code limit a legislator's private employment. Penal Code chapter 36 contains criminal provisions potentially applicable to a legislator's private compensation. A violation of these provisions is determined based on relevant facts and outside the purview of an attorney general opinion. Instead, the Texas Ethics Commission may issue opinions on ethical questions or bring civil charges for a violation of chapter 572, and local prosecutors may bring any criminal charges warranted by particular circumstances.

Very truly yours,

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