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APR 30 1999

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Opinion Committee

RQ-0062-JC

Honorable John Cornyn
 Attorney General
 Attn: Opinion Committee Chairperson
 Office of the Attorney General
 P. O. Box 12548, Capitol Station
 Austin, Texas 78711-2548

FILE # MI-40811-99
 I.D. # 40811

Dear Opinion Committee Chairperson,

The Criminal District Attorney of Waller County respectfully requests the Attorney General issue a formal opinion on the interpretation of Chapter 171 of the Local Government Code, Section 81.002 of the Local Government Code and the State Bar Regulations and previous Attorney General Opinions in light of the questions that follow:

1. Can a County Judge ethically and/or legally continue to act as a bondsman in the county where he presides as the County Judge? Does LO-88-127 and JM-927 also apply to the County Judge?
2. Can a County Judge ethically and/or legally continue to maintain interest in a bail bond business in the county where he presides as the County Judge? (In the instant case, transfer the business to his mother.)
3. Can a County Judge ethically and/or legally continue to act as a court appointed attorney, paid by the County, in the county where he presides as the County Judge?
4. Can a County Judge ethically and/or legally continue to act as an attorney, whether retained or appointed, in any case before a Judge when he is the ultimate budget officer of the Judge he is appearing before?
5. Can a County Judge ethically and/or legally continue to represent criminal defendants when he is the ultimate budget officer for the Criminal District Attorney's Office that prosecutes the criminal cases and when the Criminal D.A.'s office also acts as the legal advisor for the elected officials and Commissioner's Court?
6. Can the Assistant Criminal District Attorney ethically and/or legally continue to act as the attorney of record when her client, the County Judge, is opposing counsel?

Chad Bridges
 Asst. District Attorney

Stephanie Stephens
 Asst. District Attorney

Claudia T. Bridges
 Asst. District Attorney

Rhonda Rieken
 Asst. District Attorney

Office of the Attorney General
Conflicts
April 28, 1999
Page 2

Question One

Can a County Judge ethically and/or legally continue to act as a bondsman in the county where he presides as the County Judge? Does LO-88-127 also apply to the County Judge?

It appears that the Constitution, the County Judge's oath, Section 81.002 of the Local Government Code, Chapter 171 of the Local Government Code, the Code of Judicial Conduct and previous Attorney General's Opinions would prohibit the current County Judge from ethically and legally continuing to act as a bondsman in the county where he presides as the County Judge.

A bondsman makes a contract with the County and the State of Texas, insuring that the criminal defendant will appear. Should that defendant fail to appear, the bondsman then owes a debt to the County and the State of Texas. On the date that a defendant principal fails to appear his contract with the County and the State of Texas is breached. At that point, a Judgment Nisi is executed by the Presiding Judge and that event marks the commencement of the civil litigation. Any amount of the bond that is awarded to the County and the State is rendered in the form of a final judgment against the principal and the bondsman, jointly and severally.

The language below sets out the obligation that is normally on every bond that is executed on behalf of a criminal defendant:

“ _____, as Sureties, are held and firmly bound unto the State of Texas in the penal sum of \$ _____ Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, and each of us, our heirs, executors and administrators, jointly and severally by these presents...

.... Now, in the event the principal fails to appear before the Court at the time above stated, we bind ourselves, and each one of us, our heirs, executors and administrators, jointly and severally in addition to the principal amount specified in this bond for the payment of all necessary and reasonable expenses incurred by any and all sheriffs or other peace officers in re-arresting the principal.”

The language that is in the bond constitutes a contractual agreement between the bonding company along with the principal and the County and the State of Texas. It is the opinion of this office that this type of an agreement is a conflict of interest for the County Judge. Once a civil lawsuit has begun, the County Judge would then be the chief representative and presiding officer for the County of Waller, and also the defendant in the lawsuit where the contract between the County and the principal and the surety has been breached. He cannot faithfully represent the people of Waller County who elected him to be the presiding officer of the County's governing body **and** represent himself and his financial interest in defending a lawsuit where the County is the plaintiff and he is the defendant.

Office of the Attorney General
Conflicts
April 28, 1999
Page 3

LO-88-127 quoted JM-927 (1988) and JM-855 (1988) in stating that "the commissioner's oath of office prohibits him from entering into a contract in which he and the county he serves have an interest." The same prohibition exists if the County Judge makes bail bonds as presented in the instant case now presented to you. That opinion goes on to state that "once the individual qualifies as a county commissioner, he violates his oath if he makes bail bonds."

The Attorney General held as follows in JM-927:

"A bail bond is defined in article 17.02 of the Code of Criminal Procedure as "a written undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer a criminal accusation."

A bail bond has been defined as a contract between the government and the defendant and his surety. See, e.g. Ex parte Vance, 608 S.W.2d 681 (Tex.Crim.App.1980). Article 22.02 of the Code of Criminal Procedure delineates the procedure for forfeiture of bail bonds upon failure of the defendant to appear at the appointed time and provides that "judgment shall be entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, the amount of money which they are respectively bound, which shall state that the same will be made final, unless good cause be shown why the defendant did not appear." Article 103.004 of the Code of Criminal Procedure provides that the officer who collects bail bonds and other obligations recovered in the name of the state pay the money to the county treasurer of the county for which the money was collected.

When a county commissioner acts as a surety on a bail bond he enters into a contract making the county the beneficiary if the principal fails to perform. The commissioner's oath of office prohibits him from entering into a contract in which he and the county he serves have an interest. (FN1)"

It is the position of this office that once the County Judge took his oath, he is prohibited from making bail bonds and these opinions appear to be directly on point. There is no distinction between the prohibition against the commissioner making bonds and the county judge making bonds. The same violation of the oath of office occurs.

Question Two

Can a County Judge ethically and/or legally continue to maintain interest in a bail bond business in the county where he presides as the County Judge? (In the instant case, transfer the business to his mother.)

The conflict of interest also appears to extend to the situation where the County Judge's close relatives would be prohibited from executing bonds for criminal defendants in this County, since the bond agreement states that the sureties are bound as well as their "heirs, executors, administrators, jointly and severally."

As the obligation to the County and State extends to the bondsman's heirs it seems that the County Judge would not be able to ethically and legally maintain an interest in a bonding company pursuant to Chapter 171 of the Local Government Code. The declaration that is prescribed in Chapter 171 would fail to remedy the situation where he is divided between representing the County's best interests and his own financial interest involving the bond. This conflict continues if his "heirs, executors, administrators, jointly and severally" are financially responsible for the bonds executed against the County. The same problem arises if a judgment is rendered against the member of the County Judge's family, for example his mother, where he would be classified as an heir, an executor, or an administrator.

Based on the legislative provisions and the previous opinions in LO-88-127 and LO-88-136, the County Judge would be violating his oath of office as well as section Chapter 171 of the Local Government Code if he continued to make bail bonds or if his mother continued to maintain the business. In LO-88-127, the Attorney General verified that the surety on a bail bond enters into a contract making the county the beneficiary should the principal fail to perform his duties under the bond. Once he took his oath as the County Judge he would violate his oath if he continued to make bail bonds. The conflict arises due to the pecuniary gain that he would stand to receive at the expense of the County.

The provisions in Chapter 171.002 and 171.003 were held to be dispositive in LO-88-127 in that it is an offense for a local public official to "knowingly participate in a vote or discussion involving a business entity in which the official has a substantial interest. Substantial interest was present when there was a person related to the official within the second degree of consanguinity or affinity involved in that particular business entity.

That definition applies in the instant case where the County Judge's mother continues to maintain a bail bonds business and seeks to continue to execute bail bond agreements in the county where her son is the County Judge. Regardless of whether he continues to execute bonds or his mother controls the business, and even if the County Judge filed an affidavit declaring the interest pursuant to Chapter 171, such declaration will not relieve him of his obligation. The obligation continues to exist since the language of the bond would hold him, as an heir, responsible for the satisfaction of the debt he owed to the County. This would place the County Judge in a position where he could not avoid the potential of "personal pecuniary gain at the expense of the County." LO-88-127.

Before taking his oath of office, the current County Judge was primarily responsible for the bonding business along with his mother. Pursuant to the legislative provisions and the decisions reached in the aforementioned opinions the conflict applies to the current situation and is not resolved by the County Judge's mother continuing the business. Furthermore, §171.003 and §171.004 specifically prohibit any local official from acting as a surety for any "business entity" contracting with the County. A bail bond business is a business entity that contracts with the County, by and through the Sheriff, to ensure the appearance of criminal defendants in court.

The assistant district attorneys in this office actively pursue the collection of forfeited bail bonds and the County Judge has ultimate control over the budget for this office except for the salary for the elected Criminal District Attorney. This places the County Judge in the position of affecting the budget of the office that will be prosecuting the bond forfeiture case against him or his mother. Furthermore, the assistant district attorneys then have a conflict of representation if they represent the County in a suit against their client, the County Judge. This conflict is one that cannot be resolved or alleviated.

The County Judge is of the opinion that the prohibitions concerning the Commissioner in LO-88-127 do not apply to him because he is a County Judge who is also an attorney. This brings us to several other questions regarding that issue. This office feels that the provisions of his oath would be violated and Chapter 171 would be violated despite the fact that the County Judge is an attorney.

Question Three

Can a County Judge ethically and/or legally continue to act as a court appointed attorney, paid by the County, in the county where he presides as the County Judge?

A problem arises from the County Judge practicing criminal law in this County and incurring fees as a court-appointed attorney. The County Judge must approve the accounts payable, including the fees for court appointed attorneys in the criminal cases. (Should the County Judge be allowed to maintain a private law practice and practice in criminal courts, he may be appointed by the Court to represent a criminal defendant.) It appears that pursuant to Chapter 171, the County Judge would then have to abstain and follow the procedure of filing an affidavit and abstaining from a vote regarding this matter.

If the County Judge is allowed to make bonds for people as an attorney then he may be placed in the situation where his clients ask him to represent them in their case. Should he decide to take their case and represent the criminal defendant who he made bond for, the next three questions come into play.

Question Four

Can a County Judge ethically and/or legally continue to act as an attorney, whether retained or appointed, in any case before a Judge when he is the ultimate budget officer of the Judge he is appearing before?

Question Five

Can a County Judge ethically and/or legally continue to represent criminal defendants when he is the ultimate budget officer for the Criminal District Attorney's Office that prosecutes the criminal cases and when the Criminal D.A.'s office also acts as the legal advisor for the elected officials and Commissioner's Court?

Question Six

Can the Assistant Criminal District Attorney ethically and/or legally continue to act as the attorney of record when her client, the County Judge, is opposing counsel?

The last three questions go hand in hand. This office acts as legal counsel for all the County officials and department heads. This office prosecutes the cases against persons charged with criminal offenses. The office prosecutes the bond forfeitures and seeks collection on final judgments. The County Judge has control over our budget and his presence in the courtroom as either the bondsman or the defense attorney has a significant impact on our ability to prosecute the criminal and civil cases and give legal advice.

Under the Rules of Professional Responsibility, an attorney cannot represent clients when there is a conflict unless the conflict is openly addressed and the two clients agree to waive the conflict of representation. The Assistant Criminal District Attorney has no way to remedy the conflict of representing the County of Waller and/or the State of Texas when the County Judge is opposing counsel. There is no mechanism available to waive the conflict to the County of Waller and the State of Texas and gain their permission to continue to act as attorney of record against a person who is her client.

In addition to the conflict of representation, the County Judge has ultimate control over the budgets for this office and the offices of the Judges for the Judicial Districts and the County Court at Law. This puts the District Attorney's Office and the Judges in the position to have to recuse themselves and incur expenses to provide special prosecutors and visiting judges in order for the County Judge to practice criminal law and execute bail bonds. The criminal cases will be presided over by these judges and the bond forfeiture cases will also be heard by these judges, who will have the same concern regarding their budgets that the D.A.'s office has. This conflict exists regardless of whether the County Judge is retained as counsel or appointed. This conflict exists regardless of whether he maintains the bail bond business or his mother maintains the bail bond business.

The Honorable Glenn Taylor, County Judge for Waller County, Texas was asked to submit his position in these matters for your office to review. He declined to submit his own letter and instead has submitted an opinion he obtained from David Brooks regarding questions that he posed. We do not have a copy of the request that was sent to Mr. Brooks, but we have attached the response from Mr. Brooks on behalf of the County Judge.

The opinion given to the County Judge by Mr. Brooks contains some advice that is contrary to the previous opinions given by the Attorney General's Office and contrary to our interpretation of the relevant legislative provisions as follows:

- The opinion states that a bail bond is not a contract. By the very language in a bail bond, a bond is a contract. LO-88-127 and JM-927 confirm that a bail bond is a contract. Furthermore, Mr. Brooks' opinion states the County Judge "intending to practice law in his county would certainly be advised to decline service on the County Bail Bond Board in an effort to avoid any appearance of a conflict of interest or other impropriety." There is no provision that would alleviate his substantial interest or the violation of the judge's oath by entering into a contract with or claim against the county simply because the county judge intends to practice law. The opinion from Mr. Brooks does address the fact that the provisions of Chapter 171 states that a local official is prohibited from acting as a surety for

any business entity. However, he then goes on to say that it is permissible for the county judge to act as a bondsman despite the fact that a bail bond business is a business entity and a bondsman is a surety for that business entity.

- The opinion states that it is permissible for the County Judge to practice law and that the Commission on Judicial Conduct can act only if the county judge performs judicial functions. He advises that as long as the County Court's jurisdiction over probate is waived then the supervision of the Commission on Judicial Conduct would not be authorized. This is contradictory to the statement by Mr. Brooks that the Constitution created the Commission, and that its authority would be authorized over a county judge even if he were not performing judicial functions. This is compounded by the fact that the County Judge is in the same position as the assistant district attorney in that he is then in the position of opposing his own counsel in certain cases. This is a conflict that cannot be resolved. The letter goes so far as to state that the County Judge would have to get county consent to represent a person that has a matter with the County. This brings the matter full circle to the execution of bail bonds. The County Judge would have to gain the county's consent before representing himself in a bond forfeiture case along with the principal.

Canon 2 of the Code of Judicial Conduct is entitled "Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities." That Canon seems to permeate each and every one of the questions presented. Mr. Brooks even gave advice that the county judge should decline to serve on the bail bond board to avoid the appearance of impropriety. However, the letter from Mr. Brooks fails to address the appearance of impropriety regarding executing bail bonds that puts the County Judge at financial odds with the County.

As the chief representative of the county, which is a political subdivision of the State, it appears to be a conflict of interest and against public policy for the county judge to represent criminal defendants charged with violating a law of the State of Texas. Canon 2 seems to indicate that the County Judge should refrain from representing criminal defendants to avoid the appearance of impropriety. The opinion from Mr. Brooks does not address whether the private practice of law in light of Canon 2 and section 81.002 should be limited to civil litigation. This office is of the opinion that as the representative of the County and thereby an agent of the State, it is not appropriate for the county judge to represent criminal defendants whether appointed or retained.

There are several opinions that discuss the public policy of not serving two masters and the need for the citizens of a County to have undivided loyalty from its officials. Opinion No. DM-244 rendered on August 12, 1993 discussed the public policy against dual agency. "The doctrine was stated as follows in *Scott v. Kelso*, 130 S.W. 610, 611 (Tex.Civ.App.--1910, no writ): 'In all cases the principal is entitled to the best effort and unbiased judgment of his agent, and the law, for reasons founded in public policy, forbids the agent's assumption of a relation which affords temptations antagonistic to [t]his duty.'"

The Attorney General also discussed a conflict of interest in JM-1006 that was contrary to public policy, "Public policy has long prohibited public officers from holding other positions, executing contracts, or **engaging in private activities that conflict with their public duties**. That policy has been engrafted in the Texas Constitution and statutes. See, e.g., Tex. Const. art. III, 18, 22; V.T.C.S. art. 6252-9b; Local Gov't Code, ch. 171, 81.002." (emphasis added). For example, the assistant criminal district attorneys can maintain a private law practice, but must refrain from representing any interest that puts them in opposition to an interest of the County or the state of Texas. Therefore, it would be inappropriate for that private law practice to include representing a criminal defendant or suing the county in a civil litigation. County Judges and any other county officials that happen to be an attorney should be held to the same standard. However, there is one distinction. The assistant criminal district attorneys, unlike the County Judge, have no control over the budgets of the Judges. For the County Judge to practice either civil or criminal law before Judges in Waller County creates the appearance of impropriety. It is our position that the County Judge should not maintain a private practice in any court over which he has budget authority.

JM-1006 dealt with a situation where the County Judge had waived any compensation that would result in his membership to the board of the directors for a non-profit organization. In this instant case, the County Judge would have a financial interest in the bail bond business and that interest in contrary to that of the County.

JM-1006 went on to cite the Meyers v. Walker case:

"The leading Texas case in this area of law is Meyers v. Walker, 276 S.W. 305 (Tex. Civ. App.--Eastland 1925, no writ). Although that case involved city officials who had a pecuniary interest in a contract, the court's restatement of the public policy behind such prohibitions is instructive to our current inquiry. The court said:

These safeguards in letting contracts were not provided with the thought that the public official was corrupt, but that, in the expenditure of public money, the strictest requirement should be followed. Our law-makers were wise in trying, not only to remove temptation, but to place the public official even above the suspicion of wrongdoing. The idea of keeping the public in the confidence of the official would bring co-operation and loyalty in the administration of government and enforcement of law, and these principles underlie the security of our government.

Meyers v. Walker, supra, at 307.

The County Judge as a bondsman, regardless of whether he is an attorney, has a fiduciary duty to his bail bond business, therefore, the constant opportunity exists for his public duty to conflict with his private interest as discussed in JM-1006.

In closing, the conflict between the County Judge's duty to the County and his private financial interest take many shapes:

- The County Judge has ultimate control over the opposing counsel's budget;
- The County Judge has ultimate control over the presiding judge's budget;
- The County Judge is the county representative and presiding officer of the governing body for the County, a political subdivision of the state, and he should not receive pecuniary gain for taking a position contrary to the County;
- The County Judge would be involved in contracts that put his financial interests directly adverse to that of the County that he represents;
- Should any one of those contracts be breached, he would be involved in civil litigation as a defendant against the County;
- Should the contract be breached, he would be representing himself as a defendant against the political subdivision that he has been elected to represent;
- Should the bail bond business be maintained by his mother, he is still responsible for the bond as an heir, administrator and/or executor;
- Should the contract be breached he would not have the ability to gain the consent of the County and the State of Texas to resolve that conflict;
- The State of Texas, whether acting as the prosecutor or the attorney for County Judge, cannot resolve the conflict of litigating a case against a client with the State of Texas

If the County Judge is allowed to continue to execute bail bonds, the Constitution, the County Judge's oath, Canon 2, §81.002 and Chapter 171 of the Local Government Code have been violated and decisions rendered in previous Attorney General Opinions will have been disregarded.

If the County Judge's mother continues to execute bail bonds the Constitution, the County Judge's oath, Canon 2, §81.002 and Chapter 171 of the Local Government Code have been violated and decisions rendered in previous Attorney General Opinions will have been disregarded.

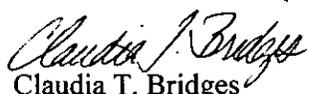
If the County Judge continues to practice criminal law in the county in which he presides in, the Constitution, the County Judge's oath, Canon 2, §81.002 and Chapter 171 of the Local Government Code have been violated, and decisions rendered in previous Attorney General opinions will have been disregarded.

Your guidance and advice is needed regarding all of these questions and concerns. I have attached a copy of the letter from David Brooks, which the County Judge asked to be submitted as his position in this matter. I have also attached a copy of a bond to illustrate the language of the bond constituting a contract. The example submitted is from the County Judge's bonding business, executed after his oath of office and bearing the signature of Mary Taylor, the County Judge's mother.

Office of the Attorney General
Conflicts
April 28, 1999
Page 10

Thank you for your time and assistance in this matter. Please contact me if I can provide any further information or supplemental brief in this matter.

Sincerely,



Claudia T. Bridges
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