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OPINION COMMITTEE

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May 15, 2003

**RQ.0056.GA**

Greg Abbott  
Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

FILE # ML-43107-03  
I.D # 43107

Re: Request for Opinion on Penal Code Section 38.16 (Preventing Execution of Civil process)

Dear General Abbott:

I am requesting an opinion from your office regarding interpretation and the constitutionality of Penal Code Section 38.16.

The following scenario occurred: a constable sought to serve civil process on X at the corporation where X was an employee. The constable contacted the business's personnel director, who then went back into a restricted area of the business and advised X that the constable was there to serve him with the process. X declined to come out and accept the paperwork. When the personnel director advised the constable of this fact, he refused to allow the constable access into the company's restricted area to attempt to personally serve X. The constable went to a justice of the peace and swore out a complaint against the personnel director for the Class C Misdemeanor offense of preventing execution of criminal process under Penal Code Section 38.16:

- (A) A person commits an offense if he intentionally or knowingly by words or physical action prevents the execution of any process in a civil case....

Once this came to my attention. I was of the opinion that the personnel director had not violated the statute, and the warrant was subsequently pulled.

Thus, the first question is whether or not the personnel director violated the statute by not allowing the constable to enter a business's restricted area to personally serve civil process to an employee who the personnel director had made aware of the constable's presence and who refused to come out and accept service.

There are no Texas cases directly on point that I could locate, but there is a little help from other states. In *Gateway 2000, Inc. v. Limoges*, 552 N.W.2d 591 (S.D. 1996), the South Dakota Supreme Court held that a corporation had a justifiable expectation of privacy in its employee work areas that were not open to the public; that an officer could not cause corporate management or security to force an employee to accept service of process; an officer's entry into the private areas of a corporation, by force or threat

of arrest, to serve civil process on employees would constitute “breaking or entering” and thus could violate Fourth Amendment rights; and, finally, a person who wishes to avoid service of process has the right to close the door to his home or to private areas of his business to keep a law enforcement officer out. In essence, when a law enforcement officer acts in the capacity of a private process server, he has only the authority of a private process server and cannot forcibly enter beyond the visitor entrance. *Gateway 2000, Inc.* at 595. The South Dakota court partially relied on *United States v. Olander*, 584 F.2d 876 (9<sup>th</sup> Cir. 1978), *vacated on o.g.*, 443 U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878, for the proposition that serving civil process in other than a peaceful manner, such as by forcible entry, constitutes a Fourth Amendment violation.

The Virginia Attorney General offered an opinion in 1999, holding that a private process server who enters into private offices of a business area to serve process where there is a justifiable expectation of privacy may constitute unreasonable search and seizure, and, because he is not acting under “authority of law,” may be liable for trespass. *Op. Va. Att’y Gen. No. 32 (1999 WL 1211273 (Va.A.G.))*.

Directly on point, the Tennessee Attorney General opined that a private business may refuse access to the private areas of its business property to a private process server or a sheriff who is attempting to serve civil papers, but may not refuse access to areas open to the public. *Op. Tenn. Att’y Gen. No. 01-149 (2001 WL 1218274 (Tenn.A.G.))*.

The second question has to do with the constitutionality of Section 38.16. Given the dearth of guidance in the statute as to what constitutes “preventing execution,” is it overly vague to the extent that it is not enforceable? For example, if denying access by a process server to a private work area of a business is appropriate behavior, can that still be interpreted as “preventing execution?”

Your assistance in clarifying these questions will be greatly appreciated.

Yours very truly,

A handwritten signature in black ink, appearing to read "Rick Miller". The signature is fluid and cursive, with a long horizontal stroke at the end.

Rick Miller  
Bell County Attorney