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OPINION COMMITTEE

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February 11, 2005

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VIA CERTIFIED MAIL

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0319-GA

RE: Request for Opinion

Dear General Abbott:

I am requesting an opinion on the following question: May the Jeff Davis County Attorney and the Presidio County Attorney enter into a reciprocal arrangement whereby the Jeff Davis County Attorney would also be appointed Assistant Presidio County Attorney and vice versa?

FACTS:

Jeff Davis County and Presidio County are neighboring counties in Far West Texas. Each county has a relatively small tax base and each county attorney's office is limited to a single attorney. Neither county now has, nor to my knowledge has ever had, an assistant county attorney.

It has been common practice between the two counties to appoint the neighboring county attorney as special prosecutor/attorney pro tem for cases arising in the absence of the county attorney. This is done under the provisions of Tex. Code Crim. Proc. Art. 2.07. Although, in this scenario, the attorney pro tem is already an attorney for the state, a court appointment is required.

This process is cumbersome, as it requires a court appointment of the neighboring county attorney even to cover a single hearing in the case during a temporary absence of the county attorney with jurisdiction. There is also some question as to whether, once the appointment is made, the attorney pro tem can return the case to the county attorney upon his or her return from the temporary absence without seeking another court order.

It has been suggested that the two county attorneys create an uncompensated position of assistant county attorney in each county, with each county attorney agreeing to serve as an assistant to the other. As such, the Jeff Davis County Attorney would also be Assistant Presidio County Attorney and the Presidio County Attorney would be Assistant Jeff Davis County Attorney.

This arrangement would eliminate the need to appoint a special prosecutor to cover simple hearings arising during the temporary absence of the county attorney for vacation, sick leave, etc.. It would also eliminate the need to obtain permission from the court for the neighboring attorney to withdraw from the case once the county attorney returns.

One condition of such an arrangement would be that the appointment as Assistant County Attorney would only extend to criminal and juvenile matters, and would exclude any civil duties, such as reviewing contracts or advising the Commissioners Court.

LEGAL ANALYSIS

The first hurdle the proposed arrangement would need to overcome would be Article XVI, Section 40 of the Texas Constitution, which prohibits any person from holding more than one civil office of emolument. I do not believe the proposed arrangement would run afoul of this provision, since an Assistant County Attorney does not hold a civil office of emolument. *See* Attorney General Letter Opinion 89-058 (assistant county attorney not a civil office of emolument).

Tex. Code Crim. Proc. Art. 2.07(b) prohibits payment of additional compensation to attorneys for the state appointed as attorneys pro tem, except expense reimbursement. The assistant county attorney positions do not currently exist, are not funded, and if created would be entirely without compensation or benefits of any kind, other than expense reimbursement. Thus, there would be no violation of this statutory prohibition.

The next question, of course, would be whether the two positions are incompatible. There would certainly be no issue of self-employment, as the two county attorneys hold separate offices in separate counties, with neither having jurisdiction or hiring authority over the other's office. The assistant county attorney would serve under the direction and at the pleasure of the county attorney for matters within that county.

The analysis would seem then to turn on whether such an arrangement would create conflicting loyalties. As proposed, the assistant county attorney positions would be limited to criminal and juvenile prosecutions. In this regard, the duties of the two county attorneys are identical - to represent the State of Texas in the courts within their respective jurisdictions. In essence, the two are already co-counsel representing the same client.

Even if a request were made by the district attorney for the county attorney's office to assist in a felony case under Tex. Code Crim. Proc. Art. 2.02, there would be no conflict, as both counties are served by the same district attorney.

Certainly, if the assistant county attorney position involved civil duties, there would be a

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potential for conflicting loyalties if a dispute arose between the two counties. It would seem, however, that prohibiting the assistant county attorney from performing any civil duties (other than juvenile prosecutions) would eliminate this potential conflict.

CONCLUSION

Based upon the above, I believe the proposed arrangement to be lawful. It would provide a common sense solution to both logistical and budgetary problems in the two counties and would save the taxpayers' money.

However, because I am one of the affected officials, I would like an opinion from your office as to the legality of the proposed arrangement before proceeding. The old adage regarding an attorney who represents himself is fully applicable here. I would prefer not to give legal advice to myself.

Respectfully submitted,



Bart E. Medley
Jeff Davis County Attorney