



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 15, 1994

Mr. Valentin P. Colmenero
Office of the County Attorney
Jim Wells County
P.O. Drawer 2080
Alice, Texas 78333

Letter Opinion No. LO94-055

Re: Conflicts of interest involving officers and
employees in Jim Wells County (RQ-650)

Dear Mr. Colmenero:

You inquire about possible conflicts of interest involving a county commissioner for Jim Wells County, Ms. Zenaida Sanchez, and other officers and employees in the county, some of whom are relatives of Ms. Sanchez. You have not asked us to consider any specific statutes, but we will raise and address those that we believe are relevant.

Ms. Sanchez wishes to know whether she may continue to accept judicial appointments to represent indigent defendants while also serving as a county commissioner for Jim Wells County. Article 26.04 of the Code of Criminal Procedure provides that the court shall appoint an attorney or attorneys to represent an indigent defendant charged with a felony or misdemeanor punishable by imprisonment. The compensation of the court-appointed counsel is determined according to article 26.05 of the Code of Criminal Procedure.

As a county commissioner, Ms. Sanchez is not required to accept appointments to represent an indigent defendant. Article 26.06 of the Code of Criminal Procedure provides in part:

No court may appoint an elected county, district or state official to represent a person accused of crime, unless the official has notified the court of his availability for appointment. If an official has notified the court of his availability and is appointed, as counsel he may decline the appointment if he determines that it is in the best interest of his office to do so.

Code Crim. Proc. art. 26.06. This provision relieves a county commissioner from the duty of accepting an appointment by a court to serve as counsel for an indigent defendant in criminal case, but does not preclude the commissioner from serving if she decides to do so. *Williams v. State*, 321 S.W.2d 72 (Tex. Crim. App. 1958), *cert. denied*, 359 U.S. 930 (1959); *see also Ex parte Reece*, 417 S.W.2d 587 (Tex. Crim. App. 1967) (petitioner was not denied a fair trial or due process because his court-appointed counsel was a county judge at time of trial).

She is, however, concerned about the appearance of impropriety in the dual roles of court-appointed attorney and county commissioner.¹ The Texas Disciplinary Rules of Professional Conduct include the following general rule on conflict of interest:

(b) . . . [A] lawyer shall not represent a person if the representation of that person:

...
(2) reasonably appears to be or become adversely limited by the lawyer's . . . responsibilities . . . to a third person or by the lawyer's . . . own interests.

Gov't Code tit. 2, subtit. G, App. A, art. X, § 9, Tex. Disciplinary R. Prof. Conduct 1.06 [hereinafter Tex. Disciplinary R. Prof. Conduct]. The Preamble to the Texas Disciplinary Rules of Professional Conduct states that "[v]irtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibility to clients, to the legal system and to the lawyer's own interests." *Id.* pmb., para. 7. "The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. . . by stating minimum standards of conduct." *Id.*

Circumstances may arise in which the commissioner's representation of an indigent defendant or indigent defendants in general may reasonably appear to be or may become "adversely limited" by her own interest in serving as a county commissioner or by her responsibilities to a third party that arise because of her office. In this event, she must refuse the court appointment, as article 26.06 of the Code of Criminal Procedure authorizes her to do. Whether rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct would require the county commissioner to refuse a court appointment in a particular case involves the investigation and resolution of fact questions, which is beyond the scope of an advisory legal opinion.

We will, however, mention some powers of the commissioners court that have the potential for raising conflicts of interest within rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct. Jim Wells County is in the 79th Judicial District, which also includes Brooks County. Gov't Code, § 24.181. The commissioners courts of the two counties have considerable authority over the budget of the prosecuting attorney for the district. *See* Gov't Code § 41.106 (prosecuting attorney sets salaries of assistant prosecutors and other office personnel, subject to approval of commissioners courts of counties composing the district); *Commissioners Court v. Criminal Dist. Attorney*, 690 S.W.2d 932 (Tex. App.--Austin 1985, writ ref'd n.r.e.) (commissioners court authorized to change salaries set by prosecutor pursuant to section 41.106 of Government Code);

¹The former Code of Professional Responsibility admonished lawyers to avoid the appearance of impropriety. Gov't Code tit. 2, subtit. G App. A, art. X, § 9, Code Prof. Responsibility EC 9-6 (1988).

§ 41.107 (authorizing commissioners court to furnish office space, supplies, and equipment for prosecuting attorney's office, to pay expenses of operating office, and to furnish automobiles for use of office). *See also* Local Gov't Code § 151.001 (commissioners court may determine number of deputies, assistants, or clerks that may be appointed by district officer).

The commissioners court also has a role in determining the district judge's compensation. It may pay the judge an annual salary of \$1,200, which is in addition to the state-funded salary, Gov't Code § 32.125, and may compensate the district judge for serving on the juvenile board, Hum. Res. Code § 152.0034. We cannot say as a matter of law that Ms. Sanchez's role as a county commissioner is in conflict with her role as a court-appointed attorney in representing indigent defendants, but we advise her to evaluate each appointment for possible conflicts.

Ms. Sanchez shares office space with a newly-appointed assistant district attorney serving Jim Wells and Brooks Counties. She asks whether continuing to share office space with this person will result in a conflict of interest or an appearance of impropriety if they are engaged in adversarial proceedings in criminal cases and whether she and the assistant district attorney may handle criminal cases against one another.

Rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct is relevant to these facts. Tex. Disciplinary R. Prof. Conduct 1.06(b)(2); *cf. Haley v. Boles*, 824 S.W.2d 796 (Tex. App.--Tyler 1992, no writ) (counsel whose law partner was married to prosecuting attorney could not represent indigent defendants by court appointment because the marriage created appearance of compromise to defendant's right to effective counsel, diminished appearance of counsel's independence, and created appearance of conflict of interest involving law partner's community property interest in prosecutor's earnings). The office-sharing arrangement may raise practical problems with respect to maintaining the confidentiality of client information pursuant to rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. *See* Tex. Disciplinary R. Prof. Conduct 1.05; *see also* Code Crim. Proc. art. 2.08 (district and county attorney shall not be of counsel adversely to the state in any case); Prof. Ethics Comm. of State Bar, Opinion 323 (Oct. 1966), *reprinted in* 30 TEX. B. J. Supp. (March 1967) (county attorney's disqualification to defend criminal cases extends to his partners or associates). We finally point out that the question of conflict of interest should be looked at from the defendant's perspective. *See Haley*, 824 S.W.2d 796.

You ask whether Ms. Sanchez may receive payment for representing indigent defendants while serving as county commissioner, since the commissioner's court must approve payment of bills for the county, including bills for her work as court-appointed attorney. Attorneys fees and expenses paid to a court-appointed attorney "shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held." Code Crim. Proc. art. 26.05(d). The commissioners court of a county "shall audit and settle all accounts against the county and shall direct the payment

of those accounts." Local Gov't Code § 115.021; *see* Attorney General Opinion H-910 (1976).

Chapter 171 of the Local Government Code regulates certain conflicts of interest involving local public officials, including members of the commissioners court. Attorney General Opinion DM-279 (1993). Section 171.004(a) of the Local Government Code provides as follows:

If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter.

A local public officer has a substantial interest in a business entity if he or she owns at least 10 percent or \$5,000 of the fair market value of the business entity, or if he or she receives funds from the business entity in excess of 10 percent of gross income for the previous year. Local Gov't Code § 171.001(1). A "business entity" is "a sole proprietorship,² partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law." *Id.* § 171.001(2).

Ms. Sanchez maintains a part-time law practice, a business entity within chapter 171. Information provided indicates that she is the sole owner, and thus has a substantial interest in her law practice. Accordingly, before the commissioners court considers approving bills for Ms. Sanchez's work as court-appointed attorney, she must file an affidavit stating the nature and extent of the interest, and shall abstain from further participation if:

(1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public.

Local Gov't Code § 171.004. Whether an action by a local governmental body will have a "special economic effect" on a business entity is ordinarily a fact question that cannot be resolved in the opinion process. However, in this case, we can conclude as a matter of law that approval of bills for her work will have a special economic effect on her law practice that is distinguishable from the effect on the public.

²A "sole proprietorship" is a single person engaging in business by himself. 19 ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS, § 3 (Texas Practice 1973); 18A AM. JUR. 2d Corporations § 154 (1985); *see also* *Shermco Indus. v. Secretary of United States Air Force*, 452 F. Supp. 306, 314 (N.D. Tex. 1978). No formalities are required to establish the proprietorship. HAMILTON, *supra*. Any profits belong to the proprietor. *Id.*

Ms. Sanchez is a sister of the county attorney, and she wishes to know whether this relationship will involve her in conflicts of interest in her capacity as county commissioner. We will consider the application of chapter 573 of the Government Code,³ which prohibits nepotism. Section 573.041 of the Government Code provides as follows:

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

(1) the individual is related to the public official within a degree described by Section 573.002 [the third degree by consanguinity or within the second degree by affinity].

Acts 1993, 73d Leg., ch. 268, § 1, at 646. Sisters are related within the second degree by consanguinity. Gov't Code § 573.023(c)(2).

This provision applies only where the commissioners court appoints an officer or employee related to a member of the commissioners court within a degree of consanguinity or affinity described by section 573.002 of the Government Code. The county attorney is an elected official, and that office may be filled by appointment of the commissioners court only in case of a vacancy. Local Gov't Code § 87.041(a). You indicate that the county attorney of Jim Wells County was elected to her office; moreover, correspondence in the file shows that the county attorney held office before her sister was elected county commissioner. *Id.* § 151.004. Since the commissioners court of which Ms. Sanchez is a member had no role in appointing the county attorney, there is no violation of section 573.041 of the Government Code. The commissioners court's approval of the county attorney's salary claims does not violate the nepotism laws. Attorney General Opinion H-1210 (1978).

The county commissioner does not have an interest in her sister's compensation as county attorney.⁴ She is not involved in a conflict of interest by participating as a member of the commissioners court in setting the salary, expenses, and other allowances of the county attorney pursuant to section 152.013 of the Local Government Code, or in

³The prohibitions against nepotism were formerly codified as V.T.C.S. articles 5996a through 5996i (1925). These provisions have been codified as chapter 573 of the Government Code in a nonsubstantive revision of statutes relating to areas of government that affect both state and local entities. Acts 1993, 73d Leg., ch. 268 (Degrees of Relationship; Nepotism Prohibitions).

⁴For purposes of chapter 171 of the Local Government Code, which regulates conflicts of interest involving local public officers, a local public official is considered to have a substantial interest in a business entity or real property if a person related to the official in the first degree by consanguinity or affinity has a substantial interest in the business entity or real property under section 171.002 of the Local Government Code. Local Gov't Code § 171.002(c).

approving the county attorney's claims for salary, expenses, or other allowances pursuant to section 115.021 of the Local Government Code.

Finally, the brother-in-law of the county commissioner is the district attorney's investigator. Ms. Sanchez is concerned about avoiding a conflict of interest when making decisions pertaining to the district attorney's office.

Chapter 151, subchapter A of the Local Government Code provides in section 151.001(a) that a district officer who requires "the services of deputies, assistants, or clerks in the performance of the officer's duties" shall apply to the commissioners court for authority to appoint the employees. The commissioners court "shall determine the number of employees that may be appointed and shall authorize their appointment." Local Gov't Code § 151.002. Neither the commissioners court nor a member of the court may "attempt to influence the appointment of any person to an employee position authorized by the court under this subchapter." Local Gov't Code § 151.004. Since the commissioners court has no power to choose the district attorney's investigator, the facts presented raise no issue of violation of the nepotism statute. Attorney General Opinion H-697 (1975); *see also* Attorney General Opinion H-1206 (1978). Moreover, since the county commissioner has no interest in her brother-in-law's salary, expenses, or allowances, these facts raise no violation of conflict of interest law.

S U M M A R Y

A county commissioner may refuse to accept a court appointment to represent an indigent defendant in a criminal case pursuant to article 26.06 of the Code of Criminal Procedure. Depending on the facts of a particular case, the representation may involve the county commissioner in a conflict of interest under rule 1.06 of the Texas Disciplinary Rules of Professional Conduct. The office-sharing arrangement that the county commissioner has with an assistant district attorney could result in a conflict of interest within rule 1.06 of the Texas Disciplinary Rules of Professional Conduct and may raise practical problems with respect to maintaining the confidentiality of client information under rule 1.05.

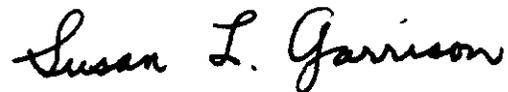
The county commissioner's law practice is a business entity within chapter 171 of the Local Government Code. The commissioners court may approve her claims for payment for representing indigent defendants, but the commissioner whose claim it is must follow the procedure for notice and recusal required by chapter 171.

A county commissioner who is a sister of the county attorney is not for that reason involved in a violation of the nepotism law. The

county commissioner in this case is not barred from participating as a member of the commissioners court in setting the salary, expenses, and other allowances of the county attorney pursuant to section 152.013 of the Local Government Code or in approving the county attorney's claims for payment pursuant to section 115.021 of the Local Government Code.

The fact that the county commissioner's brother-in-law is the investigator for the local district attorney does not involve the county commissioner in a violation of the nepotism statute. Since the county commissioner has no interest in her brother-in-law's salary, expenses, or allowances, her participation with the commissioners court in setting the salaries and expenses for the district attorney's office and approving salary payments for employees of that office will not involve her in a conflict of interest.

Yours very truly,

A handwritten signature in cursive script that reads "Susan L. Garrison".

Susan L. Garrison
Assistant Attorney General
Opinion Committee