



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 19, 1996

The Honorable George P. Morrill, II
District Attorney
156th Judicial District of Texas
Bee County Courthouse, Room 205
Beeville, Texas 78102

Letter Opinion No. 96-148

Re: Whether an elected county attorney may simultaneously serve as an assistant district attorney in the same county, and related questions (ID# 38953)

Dear Mr. Morrill:

You have requested our opinion as to whether an elected county attorney may simultaneously serve as an assistant district attorney.

You indicate that the district attorney for the 156th Judicial District, which comprises Bee, Live Oak, and McMullen counties, currently maintains an office only in Bee County. Since, as you state, "Live Oak County has a need for a District Attorney's Office in Live Oak County and for an Assistant District Attorney to be available as needed," you ask whether you may appoint the county attorney for Live Oak County to serve as an assistant district attorney in both Live Oak and the other two counties of the district.

Section 41.102, Government Code, provides that "[a] prosecuting attorney may employ the assistant prosecuting attorneys, investigators, secretaries, and other office personnel that in his judgment are required for the proper and efficient operation and administration of the office." By virtue of section 41.103, an assistant prosecuting attorney is authorized to "perform all duties imposed by law on the prosecuting attorney." In *State ex rel., Hill v. Pirtle*, 887 S.W.2d 921 (Tex. Crim. App. 1994), a district attorney appointed two assistant attorneys general to serve as assistant district attorneys in certain pending prosecutions. The defendants in one of the prosecutions raised a number of objections to the appointments.

The court of criminal appeals held, first, that a district attorney is authorized to appoint to his staff any personnel that he feels are necessary to carry out the constitutional duties of his office. The assistant attorneys general were not "special prosecutors," but merely "assistant district attorneys." *Pirtle, supra*, at 927. The court held also that an assistant district attorney is a "public employee" rather than an "officer": "[a]n assistant prosecuting attorney is hired by the district attorney, serves under his direction and at his discretion, and exercises no independent prosecutorial power." *Pirtle, supra*, at 931. Since article XVI, section 40, of the Texas Constitution prohibits merely the holding of

more than one "office," and since, according to *Pirtle*, an assistant district attorney is not an "officer," it is evident that article XVI, section 40, imposes no bar on the appointment of a county attorney as an assistant district attorney.

As to the common-law doctrine of incompatibility, it applies in three instances: "self-appointment," "self-employment," and "conflicting loyalties." Letter Opinion 92-08 (1992), Attorney General Opinion JM-1266. Clearly, since the county attorney would not appoint himself to the position of assistant district attorney, and since, if appointed, he would not supervise himself, neither of the first two aspects of the doctrine are implicated. Furthermore, the "conflicting loyalties" portion of the doctrine does not apply to a situation in which one position is an office and the other merely an employment.¹ Attorney General Opinion JM-1266 (1990). Thus, the common law doctrine of incompatibility does not hinder the appointment of the county attorney as an assistant district attorney. We conclude, therefore, that the district attorney of the 156th Judicial District may appoint the county attorney of Live Oak County to serve as an assistant district attorney for all counties in the district.

You also ask whether the district attorney may compensate the county attorney in his capacity as assistant district attorney. Section 41.106, Government Code, authorizes the district attorney to "fix the salaries of his assistant prosecuting attorneys." Clearly, the district attorney may compensate the county attorney for the services he performs as assistant district attorney.²

¹The county attorney should, of course, insure that his conduct at all times conforms to the provisions of the State Bar Disciplinary Rules of Professional Conduct. See Gov't Code § 81.001; see Tex. Disciplinary R. Prof. Conduct, reprinted in Gov't Code, tit. 2, subtit. G. - App. (State Bar Rules, art. 10, § 9).

²Section 140.003, Local Government Code, declares a district attorney to be a "specialized local entity" that is required to "file with the commissioners court of each county in which the attorney has jurisdiction" a budget for each fiscal year, and to deposit the funds he receives in the county treasury. In a multi-county district, "the district judges having jurisdiction in those counties, by a majority vote [] designate from among those counties the county responsible for managing" the district attorney's funds. Local Gov't Code § 140.003(f).

S U M M A R Y

The district attorney of the 156th Judicial District may appoint the county attorney of Live Oak County to serve as an assistant district attorney for all counties in the district, and he may compensate the county attorney of Live Oak County for his service as assistant district attorney.

Yours very truly,

A handwritten signature in cursive script that reads "Rick Gilpin".

**Rick Gilpin
Deputy Chief
Opinion Committee**