



MIKE DRISCOLL  
county attorney

INST# 12997  
MJ

July 15, 1991

RO-133

1001 Preston, Suite 634  
Houston, Texas 77002-1891  
713/221-5101  
Fax # 713/225-8924

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Honorable Dan Morales  
Attorney General of Texas  
Supreme Court Building  
P. O. Box 12548  
Austin, Texas 78711-254

RECEIVED  
JUL 18 91  
Opinion Committee

ATTENTION: Ms. Madeleine B. Johnson  
Chair, Opinion Committee

RE: Whether a constable has a duty to serve  
process for the federal courts.  
C. A. File No. 39,078.

Ladies and Gentlemen:

The constables of Harris County have requested your advice  
regarding the following questions:

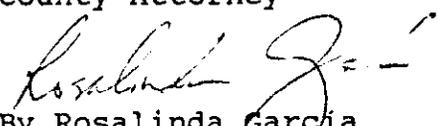
1. Do the constables have a statutory duty to serve  
civil process, including the execution of writs,  
process, and other orders issued by the federal  
courts?
2. If not, are they authorized to perform these  
services in their individual capacities?

Our memorandum brief is enclosed.

If you should have any questions—regarding this matter,  
please let us know.

Sincerely,

MIKE DRISCOLL  
County Attorney

  
By Rosalinda Garcia  
Assistant County Attorney

ACCOMPANIED BY ENCLOSURES —  
FILED SEPARATELY

Attach.

First Assistant: Marsha L. Floyd • Bureau Chiefs: James E. McKnight, Admin. Services, Jerry B. Schank,  
David R. Hurley • Division Chiefs: Dori A. Wind, Harold M. Streicher, Russell L. Drake, Mary J. McKerral,  
Donald W. Jackson, Rock W. A. Owens, Frank E. Sanders, Richard S. Hill

## MEMORANDUM BRIEF

The United States Marshals Service for the Southern District would like to enlist the aid of the Constables of Harris County in serving civil process, including the execution of writs, process, and orders issued by the federal courts. Because of the lack of adequate staff and other budgetary constraints, the U.S. Marshal would like to appoint the sheriff and/or constables to serve as the agents of the United States Marshals Service to serve the civil process requested by attorneys in federal cases. At issue, are the following questions:

1. Do the constables have a statutory duty under Texas law to serve civil process, including the execution of writs, process, and other orders issued by the federal courts?
2. If not, are they authorized to perform these services in their individual capacities?

### DUTY TO SERVE PROCESS UNDER TEXAS LAW

In order to determine whether the constables and their deputies have a statutory duty to serve civil process issued by the federal courts, an assessment of the duties of the constable must be made. The general powers and duties of constables are found in TEX. LOC. GOV'T CODE ANN. §86.021 (Vernon 1988):

(a) A constable shall execute and return as provided by law each process, warrant, and precept that is directed to the constable and delivered by a lawful officer.

(b) A constable may execute any civil or criminal process throughout the county in which the constable's precinct is located and in other locations as provided by the Code of Criminal Procedure or by any other law.

(c) A constable expressly authorized by statute to perform an act or service, including the service of civil or criminal process, citation, notice, warrant, subpoena, or writ, may perform the act or service anywhere in the county in which the constable's precinct is located.

(d) Regardless of the Rules of the Civil Procedure, all civil process may be served by a constable in the constable's county or in a county contiguous to the constable's county, except that a constable who is a party to or interested in the outcome of a suit may not serve any process related to the suit.

(e) The constable shall attend each justice court held in the precinct. [Emphasis added.]

In the event that a constable fails or refuses to execute process directed to the constable and delivered by a "lawful officer," he may be fined for contempt under TEX. LOC. GOV'T CODE ANN. §86.024 (Vernon 1988) which states:

(a) If a constable fails or refuses to execute and return according to law a process, warrant, or precept that is lawfully directed and delivered to the constable, the constable shall be fined for contempt before the court that issued the process, warrant, or precept on the motion of the person injured by the failure or refusal.

Clearly, sheriffs and constables have an affirmative statutory duty to serve civil process issued by the justice, county, and district courts of this State. Nonetheless, these provisions do not appear to expressly impose a statutory duty on a sheriff or constable to serve process or be the enforcement officers for the federal courts. Further, it is doubtful that a federal court could hold a constable in contempt for failure to serve civil process issued by a federal court in the absence of an express duty to perform this service or of an acceptance by the constable of a federal court's appointment to act as a process server.

With regard to a constable's duties, in Op. Tex. Att'y Gen. No. JM-810 (1987), the Attorney General analyzed the application of Tex. R. Civ. P. 106(b) and 103 and opined that a deputy constable appointed under Rule 106 does not act as a private process server since he has a legal duty to serve citation. Apparently, this duty arises under Tex. Loc. Gov't Code Ann. §86.021 and Tex. R. Civ. P. 105 which states:

**The officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.** (Emphasis added.)

The opinion, citing Garcia v. Gutierrez, 697 S.W.2d 758, 759 (Tex.App.--Corpus Christi 1985, no writ), further concluded that "the courts characterize as mandatory the duty of sheriffs and constables to serve all writs and processes presented to them."<sup>1</sup> Neither this Attorney General's opinion nor Garcia address whether the sheriffs and constables have a duty to serve process for the

<sup>1</sup> The Texas Rules of Civil Procedure govern "who" and "how" civil process should be served in the justice, county, and district courts of this State. Tex. R. Civ. P. 2. However, they do not appear to impose any additional duties upon sheriffs and constables.

federal courts or whether these officers may serve this process in their individual capacities as "private process servers."

On the one hand, it may be argued that this duty exists if the process is directed to the constable and it is delivered by a "lawful officer," including an officer of the court, i.e. a United States Marshal or a federal district clerk. Tex. Loc. Gov't Code Ann. §86.021. On the other hand, absent a duty imposed by state law to serve process issued by the federal courts, it appears that the sheriffs and constables may perform these services in their individual capacities. Potomac Leasing Co. v. Uriarte, 126 F.R.D. 526 (S.D. Tex. 1988); see also Kasling v. Morris, 71 Tex. 584, 9 S.W. 739 (1888) [constable entitled to reward for capturing criminal since the act was not required by his official duty]; Moore v. Sheppard, 144 Tex. 537, 192 S.W.2d 559 (1946); Tobin v. McComb, 156 S.W. 237 (Tex.Civ.App.--San Antonio 1913, no writ); Op. Tex. Att'y Gen. No. V-733 (1948) [constable may be compensated by private individuals for serving written notices in eviction cases since he has no duty to perform this service]. If the officer has no statutory duty to perform the service, it would appear that the officer would not be acting in the course and scope of his employment.

#### SERVICE OF PROCESS UNDER FEDERAL LAW

United States Marshals are empowered to serve process under Fed. R. Civ. P. 4 ["Rule 4"] and 28 U.S.C.A. §566 (West Supp. 1990). Both the rule and the statute authorize the appointment of other process servers.<sup>2</sup> Rule 4 reads, in part, as follows:

(a) **Summons: Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

\* \* \*

#### (c) Service.

<sup>2</sup> Note that an alternative to special appointment by the court seems to be provided by 28 U.S.C.A. §566 (West Supp. 1990) which reads, in part, as follows:

(c) Except as otherwise provided by law or Rule of Procedure, the United States Marshal's Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties.

Accordingly, regulations were enacted under 28 CFR §0.112 (1990) to authorize special deputation, but these provisions appear to be limited to deputation of persons to assist the United States Marshal in the performance of his "law enforcement" duties rather than the service of civil process.

(1) **Process**, other than a subpoena or a summons and complaint, **shall be served** by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.

(2) (A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

(B) **A summons and complaint shall**, at the request of the party seeking service or such party's attorney, **be served by** a United States marshal or deputy United States marshal, **or by a person specially appointed by the court for that purpose, only--**

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant an order issued by the court stating that United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

\* \* \*

(3) **The court shall freely make special appointments** to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule. (Emphasis added.)

This rule appears to authorize the federal court, not the United States Marshal, to appoint individuals to serve process. Further, while a person may derive certain authority pursuant a court appointment, this rule neither imposes any duty nor defines the authority under state law of state officers who may be appointed to process this service. 4A C. Wright & A. Miller, Federal Practice and Procedure § 1091 (1987).

As noted in some of the more recent cases, Rule 4 was amended in 1983 to liberalize its application. As the Advisory Committee's Note declares:

The purpose of this amendment is to reduce the burden on the United States Marshal's Service of serving civil process in private litigation without endangering the effective and efficient service of civil process . . . . To the extent that other facilities for personal service of process (as distinguished from service by mail), such as sheriffs, court officers, or professional process servers, remain available, the amendment would not preclude their being used, provided the person making service is a non-party over 18 years of age.

With regard to the appointment of local law enforcement officers as process servers, at least one court has concluded that a sheriff cannot be compelled by a federal court to execute on a federal judgment just as a state court could not order a United States Marshal to execute on a state judgment since the special appointment under Rule 4(c) requires the consent of appointee. Potomac Leasing Co. v. Uriarte, 126 F.R.D. 526, 527 (S.D. Tex. 1988); see also Chemical Bank New York Trust Co. v. Pug Sand & Gravel Corp., 51 F.R.D. 147 (D. Nev. 1970).

Perhaps most significant for the sheriff and constables is that it appears that a special appointment made under Rule 4 is in the person's individual capacity. Therefore, an order appointing a sheriff or constable has the effect of appointing him in his individual rather than in his official capacity. Potomac Leasing Co. v. Uriarte, 126 F.R.D. 526, 527 (S.D. Tex. 1988); Phoenix Mut. Life Ins. Co. v. Cervera, 524 F.Supp. 70, 73 (E.D. N.Y. 1981), citing Nola Electric Co. v. Reilly, 93 F.Supp. 164 (S.D. N.Y. 1948).

In conclusion, based upon the case law cited herein, it does not appear that a sheriff or constable has a duty to serve civil process issued by the federal courts and delivered by the United States Marshal or the district clerk. Therefore, if duly appointed, he may serve process in his individual capacity and thereby act as a private process server.