



JAMES M. KUBOVIAK
 COUNTY ATTORNEY
 BRAZOS COUNTY, TEXAS

RECEIVED
 JUN 17 1997
 Opinion Committee

TELEPHONE
 409/361-4300

300 E. 26th
 SUITE #325
 BRYAN, TEXAS 77803

FILE # ML-39600-97 June 12, 1997
 I.D.# 39600

RA-977

RECEIVED
 JUN 10 1997

Honorable Dan Morales
 Office of the Attorney General of Texas
 P. O. Box 12548
 Capitol Station
 Austin, Texas 78711-2548

GOVERNMENTAL INQUIRY
 UNIT

Dear Sir:

Pursuant to the Government Code 402.042, I am requesting an opinion about the following issue:

Question: May the Brazos County District Clerk simultaneously hold the position of unpaid reserve deputy sheriff ("reserve") in Brazos County?

Answer: While there appears to be no constitutional bar to serving simultaneously as clerk for the district clerk and reserve deputy sheriff where the reserve is an unpaid position, the two offices may be incompatible.

The Texas Constitution prohibits one individual from holding more than one civil office of emolument. (Tex.Const.art. XVI, §40). The term "emolument" means pecuniary profit, gain or advantage. Irwin v. State, 177 S.W.2d 970 (Tex.Crim.App. [1944]). The Brazos County District Clerk receives a salary. Brazos County reserves are unpaid. Reserves do receive an official sheriff's deputy uniform; they use a sheriff's department official vehicle while on duty. The Sheriff carries the peace officer commission of his reserve deputy sheriffs. While there may be some pecuniary gain attributable to receiving a uniform, such gain is negligible. Only the district clerk's office is an office of emolument in Brazos County.

Both the district clerk and the reserve deputy sheriff are civil offices. The district clerk is an officer of the State. (Tex.Const. art. V, §9). The clerk of the District Court is an office of the judicial department. (Tex. Const. art. V, §8). The

District Clerk, as an elected officer, must take the oath prescribed by the Texas Constitution. (Tex. Const. art. XVI, § 1[a]). A deputy sheriff is an officer of the State within the meaning of Sections 33 and 40 of the Texas Constitution art. XVI. Atty.Gen.Op. 0-373. The Sheriff holds a civil office. (Tex.Const. art. V, §23). A reserve deputy sheriff, as an appointed officer, takes the oath prescribed by the Texas Constitution. (Tex.Const. art. XVI, §1[c]). A person holding both offices will have taken two oaths prescribed by law. The Brazos County District Clerk must swear to faithfully execute the duties of the office of district clerk (Govt. Code 51.302); a Brazos County reserve deputy sheriff must swear to faithfully execute the duties of the office of reserve deputy sheriff. (Loc.Govt.Code §85.004).

Since the District Clerk, serving as a reserve deputy sheriff will receive no compensation, there is no apparent constitutional bar to the holding of both offices under the Texas Constitution art. XVI, §40.

Consider, however, the doctrine of incompatibility which prohibits one person from holding two offices if the duties of the two positions are inconsistent or in conflict, or if one office is subordinate to another. Atty.Gen.Op. DM-55 (1991). The common law doctrine of incompatibility protects the basic integrity of our institutions. Thomas v. Abernathy County Line I.S.D., 290 S.W. 152 (Tex. Comm. 1927). There is no illegality, for example, in the simultaneous occupancy of the offices of school trustee and city tax assessor where "the duties of the two offices are wholly unrelated, are in no manner inconsistent, are never in conflict. Neither officer is accountable to the other, nor under his dominion. Neither is subordinate to the other, nor has any power or right to interfere with the other in the performance of any duty." State v. Martin, 51 S.W.2d 815 (Tex.Civ.App. - San Antonio, 1932, no writ).

The clerk of the district court and the sheriff are both judicial personnel. See Texas Constitution art. V, §9 & §23. The offices are related to the extent that both serve the district judges, but the duties are distinct.

District clerks record the acts and proceedings of the court, enter all judgments of the court under the direction of the judge and record all executions issued and the returns on the executions. Gov't Code §51.303(b)(1)-(3). The district clerk plans for the preservation of the records of the acts and proceedings of the court subject to adoption by the district judges. Gov't.Code §51.804(a), (c).

"The main duties of the sheriff are to act as a conservator of the peace and the executive officer of the county and district courts; serve writs and processes of the courts; and supervise the jail and all prisoners." Tex.Const. art. V, §23, (Vernon's 1993, Interpretive Commentary). The sheriff shall execute all process and precepts directed to the sheriff by legal authority and shall return the process or precept to the proper court on or before the date the process or precept is returnable. Loc.Gov't.Code §85.021(a). Additionally, a reserve deputy sheriff may be called on by the sheriff to serve as a peace officer during the actual discharge of his official duties." Loc.Govt.Code §85.004(a). "The

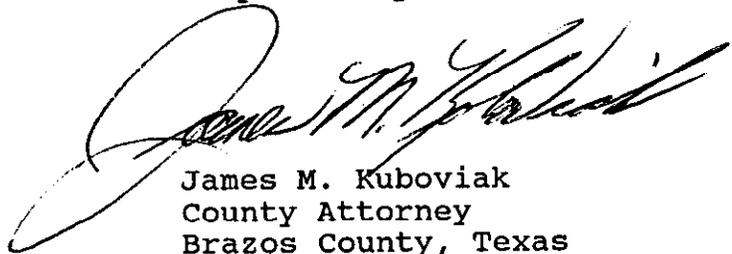
duty of every peace officer is to preserve the peace within his jurisdiction." Tex.Crim.Proc.Code §2.13. "He shall execute all lawful process issued to him by any magistrate or court." Id. "A reserve deputy serves at the discretion of the sheriff and may be called into service if the sheriff considers it necessary to have additional officers to preserve the peace and enforce the law." Loc.Govt.Code §85.004(b).

In a situation where a district clerk is serving as a reserve, he may be directed by the sheriff to execute process or warrants which were prepared by his office at the direction of a district or county judge. As such, the district clerk will be serving a judge in two capacities. He would prepare the warrant at the direct request of the judge; then he would serve the same warrant at the direction of the sheriff. A conflict of interest could be created because the duties of the two offices are related. The district clerk is directly responsible to the judge for preparing a warrant. The sheriff is directly responsible to the judge for serving a warrant, and his deputies are responsible to him. It is similar to a chain of custody where one person serves as two links in the chain. Where both officers are charged with handling the same documents, there is a relationship between the two offices. Conflicts could arise in a question of the prompt return or even the proper return of the process where the reserve charged with executing and returning the process is the district clerk charged with noting that return and managing the record.

The Sheriff is also charged with keeping the peace. Since the reserve deputy sheriff is subject to being called to duty in an emergency, the district clerk serving as a reserve might be called away from his office by the sheriff. The Brazos County District Clerk's Office has numerous deputy clerks, so the office would not be left vacant. Nevertheless, since the district clerk serves at the direction of the judges, his absence while in service to the sheriff might create a conflict of interest.

Other than these possible practical conflicts of interest, there appears to be no legal bar to the clerk of the district court serving simultaneously as an unpaid reserve deputy sheriff.

Respectfully submitted,



James M. Kuboviak
County Attorney
Brazos County, Texas



MEMORANDUM

TO: Interested Parties
FROM: Sarah J. Shirley, Chair, Opinion Committee 
SUBJECT: Attached Opinion Request

If you are interested in submitting a brief regarding the attached opinion request, we ask that you do so within thirty days of the date on the attached acknowledgement letter. We have informally set this thirty-day briefing period as a matter of policy to ensure that the Opinion Committee will have adequate time to review and consider arguments relevant to the request from all interested parties. If you need additional time in which to submit your comments, please let us know by calling (512) 463-2110, so that we can make the appropriate file notation.

This office is happy to provide you with copies of briefs submitted by other interested parties. However, in order to expedite receipt of those briefs, I suggest that you contact those parties directly and request that they provide you with a copy of their submission.

Thank you for your cooperation.