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DISTRICT ATTORNEY  
105<sup>TH</sup> JUDICIAL DISTRICT  
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October 4, 2005

FILE # ML-44444-05  
I.D. # 44444

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

**RQ-D401-GA**

Re: Request for Attorney General's Opinion

Dear Honorable Gregg Abbott:

Del Mar College is a two year institution of higher education which has existed for many years in Corpus Christi. Recent developments have led to a request for information from this office which, in turn, triggered this request for an opinion from your office. The specific question which we respectfully seek an answer for is as follows:

Does the hiring of an adjunct instructor who, if applicable, is clearly within the prohibited degree of relationship to a member of the Board of Regents of the Del Mar College District constitute a violation of the Nepotism laws of the State of Texas?

While making this inquiry we are mindful of your prior opinions, Letter Opinion No. 92-43 dated August 26, 1992 and Letter advisory No. 148, dated July 27, 1977. Both these opinions, and other similar opinions, do not address the legal and factual reality attendant upon the current nature of junior college districts in Texas.

More particularly as this inquiry relates to Del Mar College, the relevant written policy is completely contrary to that which is cited in Letter Advisory No. 148. In that opinion the following policy was cited and relied upon.

"The Board of Directors of the Texas A& M University System possess the appointive power, but since executive and administrative officers have been given considerable latitude in making appointments and submitting them to the Board for confirmation, it is necessary that the requirements of the Nepotism law be applied to all System personnel exercising appointive power either in whole or part."

In substantial contrast to the above cited policy, the controlling policy for Del Mar College is set out in the following two policy provisions:

**“B2.3 Administrative Structure:** The administration of the College is under the authority of the President of the College. The President is appointed by the Board of Regents and is directly responsible to it. All other administrative officers are responsible to the Board of Regents through the president. Aside from the general authority and responsibility of the President, all administrative functions of the College are concerned with general administration, business and finance, human resources, instruction, and student services. As is necessary to implement these functions, the President is responsible to the Board of Regents for setting and describing all essential organizational and instructional units such as departments, offices, divisions and centers. The College Organizational Chart.

**B2.3.1 The President of the College:** The President of the College, as the chief executive and administrative officer of the College, is responsible to the Board of Regents for the operation of the College and its programs. In fulfilling the duties of office, the President shall act within the framework of College policy. The President shall have full power and authority (which power and authority are hereby delegated by the Board) to manage, control, and operate the College, except to the extent that such authority is required by law to be reserved to the Board or is specifically reserved to the Board in the Board Policies. Such authority and responsibility of the President shall include but shall not be limited to the following:

**B2.3.112 employ faculty and all other employees of the district.”**

Contrary to the Texas A&M University System provisions, the only reference to nepotism in the Del Mar policy is as follows:

**“B5.7 Restrictions/Relatives:** Spouses and relatives to the second degree, by blood, shall not be employed in positions resulting in a supervisory-subordinate relationship.”

(all Del Mar policies can be found at <http://www.delmar.edu/policymanual/index.html>.)

It seems apparent, from the reading of these provisions, that the only person to whom the nepotism statutes apply in the normal course of Board action would be the president of the College, who is responsible for employing faculty and other employees. The only exception would be when the Board of Regents acts when hiring the president.

This is also in line with current standards of accreditation. All institutions of higher education in Texas are concerned about compliance with the requirements established by the Southern Association of Colleges and Schools in order to maintain the accreditation of their schools. Two pertinent policy provisions of the association are as follows:

## INSTITUTIONAL MISSION

- 1.1 The institution has a clear and comprehensive mission statement that guides it: is approved by the governing board; is periodically reviewed by the board; and is communicated to the institution's constituencies.
  
- 2.1 The governing board of the institution is responsible for the selection and the evaluation of the chief executive officer.”  
(For additional provisions see <http://www.sacscoc.org/principles.asp>)

These provisions seem to amply justify the delegation of authority to the president as has been done by Del Mar College.

We are aware and concede that the legislature is the ultimate authority on this issue, but we also believe that there is some ambiguity in the applicable statutes. The statutes are found in the Education Code and are quite lengthy. We cite the applicable parts of these statutes as follows:

“§130.082. Governing Board of Junior College of other than Independent School District

(a) except as provided by Section 130.081 or another section of this subchapter, the governing boards of all junior college districts shall be constituted and chosen as described in the provisions of this section.

(d) Said Board shall be authorized to appoint or employ such agents, employees, and officials as deemed necessary or advisable to carry out any power, duty, or function of said board; and to employ a president, dean, or other administrative officer, and upon the president's recommendation to employ faculty and other employees of the junior college.

§130.084. Powers and Duties

The board of trustees of junior college districts shall be governed in the establishment, management and control of the junior college by the general law governing the establishment, management and control of independent school districts insofar as the general law is applicable.”

There would seem to be considerable doubt concerning the case of Pena v. Rio Grande City Cons. Ind. School Dist. 616 SW2d 658 (Tx Civ. App-Eastland 1981, no writ) upon which Opinion No. 92-43 so heavily relied. In that case, in order to uphold the trial court's failure to intervene, where a superintendent had hired his wife as a teacher, the appellate court concluded that a superintendent was not an officer under the nepotism laws of the State. This holding is clearly contrary to the modern weight of authority and the plain meaning of the nepotism law.

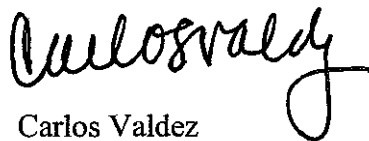
One extremely important consideration was left out of the two cited opinions from the attorney general's office. In this inquiry I am concerned about the construing and application of a criminal statute. Your response as to whether or not it applies to certain individuals or public officials would greatly clarify the way and manner of prosecuting under applicable criminal statutes.

Notwithstanding the clear and strong policy of the State against the hiring of relatives by public officials, those officials who do the actual hiring and firing should be the ones to whom the nepotism law applies. Under the facts and law presently existing in this situation the members of the Del Mar Board of Regents should not be considered as officials who do the actual hiring and firing of employees and other personnel.

A simple question requires resolution: When, if ever, would a member of the Del Mar Board of Regents either "vote for or confirm" the appointment of someone as an adjunct faculty staff person? See Tx. Gov. code §573.04.

I appreciate your kind attention to this request and anticipate your response by return mail.

Yours very truly

A handwritten signature in black ink that reads "Carlos Valdez". The signature is written in a cursive style with a large, sweeping "C" and a long, trailing "y" at the end.

Carlos Valdez  
District Attorney

CV/gc