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**OPINION COMMITTEE**

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35TH JUDICIAL DISTRICT OF TEXAS  
BROWN AND MILLS COUNTIES

FILE # ML-47293-13  
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**RQ-1131-GA**

June 3, 2013

The Honorable Greg Abbott  
Office of the Attorney General  
PO Box 12548  
Austin, Texas 78711-2548

Re: Request for Opinion – Whether a district judge may appoint an investigator to represent an indigent defendant on a felony case when the investigator is also a sitting justice of the peace?

Dear Honorable Greg Abbott:

I am writing to request an Attorney General Opinion on the following issue that affects one of the local Brown County judges. A justice of the peace in Brown County has been added to the list of private investigators that our local district court judge may appoint investigators from in felony criminal cases where a defendant is indigent.

The Code of Judicial Conduct explains that “[a]n independent and honorable judiciary is indispensable to justice in our society.” On the other hand, well settled case law indicates that court-appointed investigators in criminal cases have a duty to act as a partisan advocate for a defendant. I believe that an opinion from the Attorney General’s Office is necessary to determine if an appearance of impropriety, conflict of interest or violation of law exists when these two roles in the judicial system are held by the same person.

Although the State Commission on Judicial Conduct may have some overlapping jurisdiction to speak to the actions of the justice of the peace in seeking appointment in such cases, I believe that the Attorney General’s Office may appropriately issue an opinion to advise a district judge on the proper course of action when a sitting justice of the peace requests that his name be added to the appointment list for investigators for indigent defendants.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Micheal Murray".

Micheal Murray  
District Attorney

**BRIEF FOR THE 35<sup>TH</sup> JUDICIAL DISTRICT ATTORNEY'S OFFICE SUPPORTING  
REQUEST FOR ATTORNEY GENERAL'S DECISION**

In order to preserve the integrity of the criminal justice system, a clear line demarking a neutral, impartial judge from a partisan advocate for a defendant must be maintained. The courts of the United States and the State of Texas, the Committee on Judicial Ethics, and the Texas Private Security Board have all described the appropriate role that each party plays in the judicial system. Those roles cannot be reconciled into one person. An indigent defendant has a right to a court-appointed investigator who will be a partisan advocate on behalf of the defendant, whereas all defendants are entitled to a justice who remains impartial and independent. When those two positions merge into one person, the integrity of the adversarial system is jeopardized.

I. Issue Presented

Whether a district judge may appoint an investigator to represent an indigent defendant on a felony case when the investigator is also a sitting justice of the peace in the same county?

II. An indigent defendant has a constitutional right to an investigator who plays a partisan role supporting the defendant and who owes the defendant a duty of confidentiality

**Criminal Case Law**

The Supreme Court has “long recognized” that when the State files a criminal case against an indigent defendant, the State must “take steps to assure that the defendant has a fair opportunity to present his defense.” *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). Justice Marshall described the basis of this long-standing principle as the recognition that “justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.” *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). The community has a compelling interest in ensuring an accurate result in a criminal proceeding which jeopardizes an individual’s life or liberty. *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985). Numerous safeguards have been fashioned over the years to diminish the

risk of erroneous convictions. *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985). Justice Marshall also observed in *Ake* that:

[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and ... a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. 470 U.S. 68, 77 (1985).

Therefore, a trial court must provide an indigent defendant with the basic tools of an adequate defense. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

The basic tools of an adequate defense have been deemed to include a court appointed investigator. *See* Tex. Code Crim. Proc. §26.05(h). Someone who is appointed by the court to assist the defendant in building an effective defense must be more than simply a neutral party, the person must play a partisan role in the defense by providing tools to challenge the State's case. *See Taylor v. State*, 939 S.W.2d 148, 152-53 (Tex. Crim. App. 1996).

### III. A justice of the peace has a duty to act impartially in both judicial actions and extra-judicial actions

#### **The Code of Judicial Conduct**

The Code of Judicial Conduct ("the Code") provides guidance to justices of the peace on what type of conduct is acceptable both as an acting judge and during extra-judicial activities. *Code of Judicial Conduct*, Canon 6(C) at <http://www.courts.state.tx.us/judethics/canons.asp>.

The Code explains that "[a]n independent and honorable judiciary is indispensable to justice in our society." *Code of Judicial Conduct*, Canon 1 at <http://www.courts.state.tx.us/judethics/canons.asp>. Judges have a duty to respect and honor their office as a public trust and should strive to enhance and maintain confidence in the legal system. *Code of Judicial Conduct*, Preamble at <http://www.courts.state.tx.us/judethics/canons.asp>. Judges should avoid "lend[ing] the prestige of judicial office to advance the private interests of...others." *Code of Judicial Conduct*, Canon 2(B) at <http://www.courts.state.tx.us/judethics/canons.asp>. Judges should also "refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or

her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.” *Code of Judicial Conduct*, Canon 4(D)(1) at <http://www.courts.state.tx.us/judethics/canons.asp>.

The Code has influence beyond the judge’s actions in court as well. Any extra-judicial activities the judge participates in should not cast reasonable doubt on the judge’s ability to act impartially as judge. *Code of Judicial Conduct*, Canon 4(A)(1) at <http://www.courts.state.tx.us/judethics/canons.asp>.

Furthermore, a judge should not accept compensation or reimbursement of expenses if the source of such payment would give the appearance of influencing the judge’s performance of judicial duties or otherwise appear improper. *Code of Judicial Conduct*, Canon 4(I)(1) at <http://www.courts.state.tx.us/judethics/canons.asp>.

### **Other laws**

In addition to the Code and the Committee’s opinions interpreting the Code, additional guidance can be found in the Texas Government Code. A justice of the peace is required to provide a bond assuring the county judge that the justice of the peace will act in a manner that is impartial in discharging any duties imposed on the justice of the peace by law. Tex. Gov. Code §27.01(1).

## **IV. The role of partisan investigator and impartial justice of the peace necessarily creates a conflict of interest**

### **Committee Opinions**

The Committee on Judicial Ethics (“the Committee”) has provided opinions that interpret and apply the Code to specific situations. Several of these opinions apply the Code of Judicial Conduct (“the Code”) directly to situations where a justice of the peace wishes to obtain extra-judicial employment. In these opinions, the Committee has determined that extra-judicial employment in scenarios similar to serving as a court-appointed investigator in a criminal case was inappropriate. Although not binding, great deference should be accorded to these opinions as they provide clear guidance on how the Code is intended to be used by its drafters.

The Committee, in considering the Code, has determined that a justice of the peace should not manage a bail bond business. Committee on Judicial Ethics, *Opinion No. 142 (1991)* at <http://www.courts.state.tx.us/judethics/141-150.htm>. The Committee cites to Canon 4(D)(1) from the Code as the basis for reaching this conclusion. Committee on Judicial Ethics, *Opinion No. 142 (1991)* at <http://www.courts.state.tx.us/judethics/141-150.htm>. The Committee explicitly mentions that Canon 4(D)(1) applies to justices of the peace. *Opinion No. 142 (1991)* at <http://www.courts.state.tx.us/judethics/141-150.htm>. Canon 4(D)(1) prohibits financial dealings that would create an actual or perceived conflict for a justice. *Code of Judicial Conduct*, Canon 4(D)(1) at <http://www.courts.state.tx.us/judethics/canons.asp>.

Similarly, a justice of the peace should not serve as a reserve deputy sheriff in a different county from the county in which the justice of the peace is elected to serve. *Opinion No. 149 (1992)* at <http://www.courts.state.tx.us/judethics/141-150.htm>. The Committee cites to Canons 1 and 2 of the Code of Judicial Conduct as the basis for reaching this conclusion. *Opinion No. 149 (1992)* at <http://www.courts.state.tx.us/judethics/141-150.htm>. These canons instruct a judge to maintain a high standard of conduct such that the integrity and independence of the judiciary is preserved in the eyes of the public. *See Code of Judicial Conduct*, Canons 1 & 2 at <http://www.courts.state.tx.us/judethics/canons.asp>.

A justice of the peace should also not act as a Sales Tax Coordinator who develops tax forms, meets with businesses, issues reports, files documents with the State, and makes recommendations to city council. *Opinion No. 243 (1999)* at <http://www.courts.state.tx.us/judethics/241-250.htm>. Both Canons 3 and 4 of the Code of Judicial Conduct formed the basis of this opinion. *Opinion No. 243 (1999)* at <http://www.courts.state.tx.us/judethics/241-250.htm>.

All of these opinions examine scenarios similar to a justice of the peace being appointed by a criminal court as an investigator in a criminal case. In each of these opinions, the extra-judicial employment was determined to be inappropriate. The Attorney General's Office should consider the Committee's position in these cases when issuing an opinion in the question at hand.

### **Separation between government and private investigators**

The Texas Private Security Board (the "Board"), which licenses private investigators, has recognized that the private security industry involves a position of trust and access to confidential information, private property, and "the more vulnerable and defenseless persons

within our society.” Texas Private Security Board, *Administrative Rules Under Consideration*, p. 3, Rule 35.4(a) (April 2013) at <http://www.txdps.state.tx.us/RSD/PSB/docs/rulesUnderConsideration.pdf>. The Board has determined that clear separation in the eyes of the public between government and licensed private investigators is important to protect those vulnerable and defenseless persons from abuse and to prevent private investigators from misusing their positions of trust and access.

Rule 35 of the Standards of Conduct adopted by The Texas Private Security Board prohibits any licensees from engaging in any “unconscionable action or course of action, or engag[ing] in any false, misleading, or deceptive act or practice...” Texas Department of Public Safety, *Administrative Rules*, Title 37, Part 1, Chapter 35, Subchapter C, Rule 35.34 at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=9&p\\_dir=&p\\_rloc=&p\\_tloc=&p\\_ploc=&pg=1&p\\_tac=&ti=37&pt=1&ch=35&rl=34](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=37&pt=1&ch=35&rl=34).

Rule 35 imposes a duty on a licensee that the licensee not create a false impression that the licensee is connected with the government by wearing any identification that gives the impression that the bearer is in any way connected with any political subdivision of a state government. Texas Department of Public Safety, *Administrative Rules*, Title 37, Part 1, Chapter 35, Subchapter C, Rule 35.39 at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=9&p\\_dir=&p\\_rloc=&p\\_tloc=&p\\_ploc=&pg=1&p\\_tac=&ti=37&pt=1&ch=35&rl=39](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=37&pt=1&ch=35&rl=39).

The only exception to this rule is for full time law enforcement officers which would not apply to a court appointed investigator. Texas Department of Public Safety, *Administrative Rules*, Title 37, Part 1, Chapter 35, Subchapter C, Rule 35.39 at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=9&p\\_dir=&p\\_rloc=&p\\_tloc=&p\\_ploc=&pg=1&p\\_tac=&ti=37&pt=1&ch=35&rl=39](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=37&pt=1&ch=35&rl=39).

The Texas Occupations Code goes even farther and imposes a duty on license holders not only to not give any impression, whether through clothing or other insignia worn, that the person is connected with a political subdivision of a state government, but also not to create such an impression through identification provided or statements made by the license holder. Tex. Occ. Code §1702.130(a)(1).

### **A justice of the peace's jurisdiction would necessarily overlap with cases in which a court may appoint an investigator**

Justices of the peace have jurisdiction over criminal cases in Texas. The Texas Constitution gives jurisdiction over criminal misdemeanor cases punishable by fine only to justice of the peace courts. Tex. Const. Art. 5 §19.

Justices of the peace also serve as magistrates under the Code of Criminal Procedure. Tex. Code Crim. Proc. §2.09. A magistrate has a duty to “issue all process intended to aid in preventing and suppressing crime” and to “cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.” Tex. Code Crim. Proc. §2.10. Magistrates have several duties imposed on them to take action and report certain conduct to law enforcement. Tex. Code Crim. Proc. §§6.01-6.04; 7.01-7.18. Magistrates main duty is to advise a person arrested for a crime of the rights that person has and the procedures for requesting appointed counsel. Tex. Code Crim. Proc. §§14.06(a); 15.17. All of these actions directly relate to criminal cases and create duties for justices of the peace in criminal cases. A justice of the peace must follow the Code of Judicial Conduct by acting in a neutral and impartial manner in carrying out these duties.

Furthermore, a justice of the peace's jurisdiction does not necessarily end after performing the duties imposed under Article 15 of the Code of Criminal Procedure. Op. Tex. Att'y Gen. No. GA-0551 (2007) pp. 3-4. In fact, that jurisdiction may extend through several procedural phases of a criminal case. Op. Tex. Att'y Gen. No. GA-0551 (2007).

### **A neutral justice cannot also be a partisan investigator**

There are several reasons a person should not try to fulfill the roles of both justice of the peace and court-appointed investigator: (1) in order to comply with the Code of Judicial Conduct, a justice of the peace who was court-appointed as an investigator for a defendant could not fulfill his or her duty as a partisan advocate for the defendant thereby creating constitutional error in criminal proceedings, (2) a magistrate who was appointed as an investigator in a criminal case would be forced to recuse him or herself from duties as magistrate in any case he or she was court appointed as an investigator in, causing significant burden to the county, and (3) the risk of public perception of a misuse of authority would taint the judicial system in such a manner as to harm the integrity of criminal convictions.

V. Conclusion

Therefore, the 35<sup>th</sup> Judicial District Attorney's Office respectfully requests the Attorney General's Office to interpret the Constitution of the United States, the Texas Constitution, the Texas Government Code, the Texas Occupations Code, the Texas Code of Criminal Procedure, and the Code of Judicial Conduct to advise Brown County as to whether a court-appointed investigator can adequately perform his or her duties under the Constitution of the United States and the Texas Constitution if the investigator is also a sitting justice of the peace.

Respectfully submitted,



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