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OPINION COMMITTEE



JO ANNE BERNAL
COUNTY ATTORNEY

EL PASO COUNTY TEXAS
COUNTY COURTHOUSE
500 E. SAN ANTONIO, ROOM 503
EL PASO, TX 79901

FILE # ML-46281-0

I.D. # 46281

(915) 546-2050

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December 11, 2009

RQ-0847-GA

The Honorable Greg Abbott
Attorney General, State of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

CERTIFIED MAIL RETURN RECEIPT REQUESTED
7006 3450 0000 0851 8892

Dear General Abbott:

Enclosed please find an opinion request regarding the Authority of the El Paso County Attorney to provide legal advice and representation to the El Paso County Ethics Commission. In addition, Ethics Commission Chair Mr. Stuart Leeds requested that we attach copies of two letters addressed to Lee Shapleigh and an editorial submitted to the El Paso Times.

Sincerely,

A handwritten signature in cursive script that reads "Jo Anne Bernal".

JO ANNE BERNAL
El Paso County Attorney

cc: El Paso County Ethics Commission Members
Betsy Keller, El Paso County Human Resources Director

w/Attachments: AG Opinion Request
Stuart Leeds documents



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The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
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Austin, Texas 78711-2548

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

RE: Authority of the El Paso County Attorney to provide legal advice and representation to the El Paso County Ethics Commission

Dear General Abbott:

I am soliciting your opinion on behalf of the El Paso County Ethics Commission. My questions to you are the following:

- 1) Is the El Paso County Ethics Commission a county entity?;
- 2) Does legal representation of the Commission fall within the scope of the El Paso County Attorney's constitutional and statutory duty to provide legal representation to county entities and officials?;
- 3) Does the County Attorney have a conflict of interest in providing legal advice and representation to the Commission?; and
- 4) Is the County Attorney's consent required in order for the Commission to hire legal counsel or does the Commission have independent authority to hire outside counsel to provide legal advice to the Commission?

Background

On June 19, 2009, the Governor signed S.B. 1368 into law enacting Chapter 161 of the Texas Local Government Code. On September 1, 2009, the El Paso County Commissioners Court entered an Order pursuant to Local Government Code Section 161.051, creating the El Paso County Ethics Commission. The Commission held its first meeting on November 2, 2009. Pursuant to an agenda item at its second meeting on November 18, 2009, the Commission requested the El Paso County Attorney to seek this opinion on its behalf.

Legal Arguments and Authorities

In Attorney General Opinion No. GA-0074 (2003), you have already opined on these very issues in the affirmative regarding the El Paso County Attorney's duty and right to represent the El Paso County Bail Bond Board. We believe that the same reasoning as outlined in that opinion controls this question on the El Paso County Ethics Commission representation as well.

1. Is the El Paso County Ethics Commission a county entity?

The El Paso County Ethics Commission is a "county entity" as provided in its enabling legislation and is authorized to be created by "a county that (1) has a population of 650,000, or more; (2) is located on the international border; and (3) before September 1, 2009, had a county ethics board appointed by commissioners court." (Local Gov Code Sec 161.001) It is also authorized to be created by the Commissioners Court of a county to perform a governmental function to adopt, publish, and enforce an ethics code to govern county public servants. (Local Gov Code Secs 161.051 and 161.002(8)) Therefore, based on the same analysis in Attorney General Opinion No. GA-0074 (2003), it is our conclusion that the El Paso County Ethics Commission is a "county entity".

2. Does legal representation of the Commission fall within the scope of the El Paso County Attorney's constitutional and statutory duty to provide legal representation to county entities and officials?

First and foremost, the Ethics Commission enabling legislation itself provides that "the county attorney...with the duty to represent the county in civil matters shall represent the commission in all legal matters." (Local Gov Code Sec 161.061) The El Paso County Attorney is explicitly charged by Texas Government Code Section 45.171(a) to "represent the state, El Paso County, and the officials of El Paso County in all civil matters pending before the courts of El Paso County..." Additionally, "a county attorney has a duty under Section 41.007 of the Government Code to 'give to a county or precinct official of his district or county a written opinion or written advice relating to the official duties of that official'". (AG OP No. GA-0074 (2003), page 1) In conclusion, as you have already opined, "These provisions charge the El Paso county attorney with the legal representation of the county and its officials", including, we believe, the Ethics Commission. (AG OP No. GA-0074 (2003), page 2)

3. Does the County Attorney have a conflict of interest in providing legal advice and representation to the Commission?

It has been suggested that, due to the fact that the County Attorney represents all other county entities and county officials and employees who are subject to the jurisdiction of the Ethics Commission, a conflict of interest would exist if the County Attorney also represented and provided legal advice to the Commission. We do not believe that is the case. While State Bar disciplinary rules may prohibit private attorneys from representing clients whose interests may be adverse, that is explicitly not true for government attorneys. The Texas Disciplinary Rules of Professional Conduct provide that government attorneys "may be authorized to represent several government agencies in intergovernmental controversies in circumstances where a private lawyer could not represent multiple clients." (Preamble Scope: No. 13) Additionally, Texas Local Government Code Section 157.9015 states that "It is not a conflict of interest for a... county attorney under Section 157.901 to defend a county or county official or employee sued by another county official or employee and also to advise or represent the opposing party on a separate matter arising from the performance of a public duty, regardless of whether the attorney gives advice or representation to the opposing party before the suit began or while the suit is pending." This legal doctrine that no conflict of interest exists with multiple governmental clients for government attorneys has also been recognized by the Texas Supreme Court in Public Utility Commission of Texas v. Cofer, 754 S.W. 2d 121 (Tex. 1988), (AG OP No. GA-0074 (2003), page 4)

It has also been suggested that the County Attorney is utterly and completely conflicted from representing the Ethics Commission because the County Attorney is subject to the jurisdiction of the Ethics Commission and its Ethics Code. Finding the existence of such a comprehensive conflict would achieve an absurd result. The Ethics Commission members themselves are subject to the provisions of the Code of Ethics and the jurisdiction of the Commission and the same blanket conflict would apply to them – they could never hear and rule on any Ethics Code complaints. Additionally, licensed attorneys represent the State Bar of Texas and sit on grievance committees and they are all subject to the Texas Disciplinary Rules of Professional Conduct and State Bar disciplinary rulings. Obviously if an Ethics Code grievance was filed with the Commission against the County Attorney or one of her assistants, legal representation/advice on that particular grievance may be problematic and the County Attorney would be guided by Cofer and Local Government Code sections 157.901 and 157.9015 to resolve the issue. But to insist that a blanket conflict of interest prevents the County Attorney from providing any legal advice/representation to the Ethics Commission, despite clear statutory mandates to do so, is not reasonable. The drafters of the statute clearly both made the County Attorney subject to its jurisdiction and provided that she would represent the Commission in "all legal matters".

4. Is the County Attorney's consent required in order for the Commission to hire legal counsel or does the Commission have independent authority to hire outside counsel to provide legal advice to the Commission?

It has been suggested that Texas Local Government Code Section 161.101(d) which provides that "the commission shall be assigned staff by the county and provided access to county resources to assist in its duties" allows the Ethics Commission to seek other legal advice. Your office, however, has opined that regardless of very similar language in the Bail Bond Board statute (Texas Occupations Code Section 1704.101(8)), "it is well established law in Texas that an officer cannot be ousted from his legal duties... There could be no county matters about which advice was required that was 'not contemplated or covered' by his official duties as county attorney." (AG OP No. GA-0074 (2003), page 2) Therefore, we believe that the El Paso County Ethics Commission may not hire outside legal counsel without the express consent of and within the sole discretion of the El Paso County Attorney to determine that she is unable or unwilling to provide said legal services.

Conclusion

We believe that since the El Paso Ethics Commission is a county entity, it is the El Paso County Attorney's duty to provide advice and representation "in all legal matters" to the Commission pursuant to Texas Local Government Code Section 161.061 and other legal authority cited. As your office has opined, state law "imposes a duty on the El Paso County Attorney to provide legal counsel" to all county entities and officials and such an entity "may not seek outside legal counsel without the consent of the county attorney..." (AG OP No. GA-0074 (2003), Summary, page 5) Additionally, there is no blanket conflict of interest that would preclude the El Paso County Attorney from representing the Commission due to the mere fact that the County Attorney represents other county entities and officials that are subject to the jurisdiction of the Commission or that the County Attorney herself is subject to its jurisdiction.

I respectfully request your opinion regarding these issues.

Sincerely,



Jo Anne Bernal
El Paso County Attorney

cc: Commission Chair Stuart Leeds
Commissioner David Chavez
Commissioner David Nemir
Commissioner Terry Pasqualone
Commissioner Gina Palafox

Commissioner Marcos Lizarraga
Commissioner Roberto Oaxaca
Commissioner Luis Garcia
Commissioner Susan Barlow
Commissioner James Clair

Stuart L. Leeds

COUNTY ATTORNEY
JOSÉ R. RODRÍGUEZ

November 19, 2009

2009 DEC 11 AM 10: 59 Attorney and Counselor at Law

Lee Shapleigh
Assistant County Attorney
5th Floor, El Paso County Courthouse
El Paso, Texas 79901

Re: A.G. Opinion Request

Hand-delivered

Dear Ms. Shapleigh:

As per the approved agenda item from last night, please include the following language in the request for the A.G. Opinion:

"A. S.B. No. 1368 mentions the county attorney in three places:

1. Section 161.002 (7) where it states that the county attorney is a "County Officer"
2. Section 161.061 where it states the county attorney.... shall represent the commission in all legal matters

and

3. Section 161.210 where it states the county attorney may collect a fine or other penalty imposed by the commission.....

but

that the code is silent on whether the county attorney is the legal advisor to the commission.

B. The opinion we are requesting is distinguishable from the opinion the A.G. gave on the Bail Bond Board as the county attorney is not a bonding company and therefore not subject to the Bail Bond Boards rulings but is subject to the Ethics Commission and Code.

C. The issue of El Paso County employees running for political office without resigning or taking an unpaid leave of absence is going to be addressed by the commission. The current code which is up for review with everything being on the table for discussion and modification states: "No county official or employee shall be prohibited from seeking or holding elective office." The El Paso County Attorneys Office in the past and presently allows its Assistant County Attorneys to run for political office without resigning or taking an unpaid leave of

COUNTY ATTORNEY
JOSÉ R. RODRÍGUEZ
2009 NOV 19 AM 8: 18

absence. The Federal Hatch Act provides rules for Federal employees running for public office. The El Paso City Civil Service Commission states that a City employee who wants to run for political office has to resign City employment first. The Sheriff of El Paso, County, Texas Civil Service rules provide that an employee has to take an unpaid leave of absence to run for political office. Associate Judges (Court Masters) of El Paso County, Texas have to resign before they can run for judge. No such rules apply to El Paso County, Texas employees or Assistant County or Assistant District Attorneys. Former County Attorney of El Paso County, Jose Rodriguez, has suggested that the Ethics Commission can establish a balancing act to be used in determining the conditions under which a county employee can run, but the decision about whether or not the employee can run for office is up to management.

Therefore, in light of the above, can the Ethics Commission seek an outside, non-conflicted legal advisor not subject to the Code and Commission, as necessary and not have the county attorney as its legal advisor?"

Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stuart L. Leeds".

Stuart L. Leeds

Stuart L. Leeds

Attorney and Counselor at Law

November 20, 2009

Lee Shapleigh
Assistant County Attorney
5th Floor, El Paso County Courthouse
El Paso, Texas 79901

Re: A.G. Opinion Request

Hand-delivered

Dear Ms. Shapleigh:

To re-cap our phone conversation of yesterday: I understand you object to paragraph C of my proposed request and feel that issue may be better put off for a later A.G. opinion when that issue comes up, if necessary. I told you that, at this point, that paragraph could be deleted.

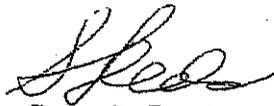
Next, can you please amend the actual question to read: "Therefore, in light of the above, can the Ethics Commission seek and use an outside, non-conflicted legal advisor not subject to the Code and Commission, such as, for instance, you, the Texas Attorney General's Office, as necessary and not have the county attorney as its legal advisor?"

Lastly, upon reflection, please allow me to see the final draft of the request before it is sent out.

Please call me on my cell today (241-8419) to let me know you received this letter.

Thank you.

Sincerely,



Stuart L. Leeds

COUNTY ATTORNEY
JOSE R. RODRIGUEZ
2009 NOV 20 AM 8:01

Should county attorney

No: New chairman says other source is needed

By Stuart L. Leeds

Guest columnist

The new County Ethics Commission must be independent from the County Attorney's Office. As an office subject to the Ethics Code, the County Attorney's Office should not advise the commission. If the commission needs legal advice, it will request it from a conflict-free source.

However, Assistant County Attorney Lee Shapleigh stated her office might think otherwise and would be providing the commission with an opinion on the county attorney's role. Therein lies the problem.

The County Attorney's Office has had years to stop corruption in county government. Corruption in fact has flourished under its watch. One problem is the favor system rampant at the county based on who you know.

For example, the County Attorney's Office makes recommendations on expunctions of arrest records. When a relative of District Attorney Jaime Esparza's secretary applied to expunge his arrest for aggravated sexual assault of a child, the County Attorney's Expunction Unit, headed by now County Commissioner Anna Perez, approved the expunction.

However, the arrest, legally, could not be expunged for 32 more years. Ms. Perez said they used their "discretion" in approving this. Interestingly, Perez and her unit told other El Pasoans seeking expunctions that they must comply with the laws time limits.

When Judge Pendergrass saw this, he ordered the



Leeds

records unexpunged. He said the original expunction was a "legal malady." Undaunted, Perez advised District Clerk Gilbert Sanchez to disobey Judge Pendergrass' order and leave the illegal expunction standing. Sanchez followed Perez' advice. Undaunted himself, Judge Pendergrass held Sanchez in contempt of court, assessing a 90-day jail sentence.

Pendergrass then told Perez that he could not understand her position that she should have joined to undo the illegal expunction.

The commission must also address county officials acting under a conflict of interest. When Alejandro Lozano filed an open records request with County Judge Cobos, Assistant County Attorney Shapleigh advised Judge Cobos that the records were public/releasable.

When Emma Acosta filed an ethics complaint against Judge Cobos for releasing the public records, the County Attorney's Office never told the Ethics Board to cease and desist from investigating Judge Cobos since he had followed Shapleigh's advice.

The County Attorney's Office has stated that they can represent both sides of an issue. This nonsense needs to stop.

Rather than wasting hours pointing out the county attorney's glaring conflicts, the commission should send them on their way and declare its independence.

County employees running

for political office while keeping their county jobs raise ethical concerns. The County Attorney's Office is the single greatest contributor to this problem. At least six assistant county attorneys have run for office while keeping their county jobs.

This practice gives county employees unfair advantages over non-county employees. Non-county employees have to use their own time and money to run, while the tax-paid county employees continue to receive their county salary, use leave time to campaign, and if they lose the election, still have their county jobs.

The offering, soliciting, accepting and giving of campaign contributions while they occupy their county positions is unseemly.

Why would a newly minted Ethics Commission allow this County Attorney's Office to be its legal advisor, a role, incidentally, not expressly delegated to it in the state legislation?

Why allow the fox to guard the chicken coop?

How would the County Attorney's Office advise the commission when its own employees stand to lose the most by an independent and strong commission cracking down on these practices?

The county attorney's solution, however, illustrates the profundity of this problem. Their solution is to give the commission a legal opinion on their role.

Remarkably, the commission did not ask them for their opinion.

Stuart L. Leeds has been a practicing attorney in El Paso for 30 years and is the chairman of the new County Ethics Commission.

advise ethics panel?