



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 29, 1998

The Honorable Rayford Ratliff
Moore County Attorney
715 Dumas Avenue
Moore County Courthouse, Room 208
Dumas, Texas 79029

Letter Opinion No. 98-086

Re: Whether section 41.011 of the Government Code, which authorizes a county attorney to conduct a private law practice from county offices, is applicable to an assistant county attorney (RQ-1032)

Dear Mr. Ratliff:

You have asked whether section 41.011 of the Government Code, which allows a county attorney, at the discretion of the commissioners court, to engage in the private practice of law from his or her official county office, would also allow the assistant county attorney to do the same. In your letter, you recount that the "Moore County Attorney's office consists of two attorneys, the County Attorney and the Assistant County Attorney, along with their staff" with an office located in the Moore County Courthouse. You state that the assistant county attorney already engages in a limited private practice from the official office of the county attorney with the consent and approval of the commissioners court.

Section 41.011 of the Government Code is titled "Private Practice in County or District Office" and it expressly permits "[a] district or county attorney who is not prohibited by law¹ from engaging in the private practice of law . . . , at the discretion of the commissioners court of a particular county, [to] conduct a private practice of law using the district or county office provided by that county for conducting his official duties." (Footnote added.) We note that the qualifications for an assistant county attorney are the same as for the county attorney who appoints him, Gov't Code § 45.002, and an assistant county attorney is allowed by statute to perform all duties imposed by law on the county attorney. *Id.* § 41.103.

In Letter Opinion No. 93-051 (1993), this office considered section 41.011² and concluded that its purpose was to "statutorily authorize the long-standing practice of many counties, particularly rural counties, of this state" of providing incentives to attract an attorney to a rural county to take

¹Prosecutors subject to chapter 46 of the Government Code, the Professional Prosecutors Act, may not engage in the private practice of law. See Gov't Code § 46.005(a).

²Act of May 15, 1987, 70th Leg., R.S., ch. 213, § 1, 1987 Tex. Gen. Laws 1502, 1502.

the position as district or county attorney. Statements made by the sponsor of Senate Bill 748³ clearly assert that a district or county attorney, at the discretion of the county commissioners court, may use the county facilities, that is, office space, secretaries, and telephones, to practice private law. See Letter Opinion No. 93-051 (1993) at 2. We believe the purpose and intent of section 41.011 is to provide a way for small rural counties to offer additional compensation to county attorneys who are paid a low or nominal salary.⁴

Although article III, section 52 of the Texas Constitution prohibits the use of public funds for private purposes, we stated in Letter Opinion No. 93-051 that the “legislature statutorily may authorize a subdivision of the state to provide its employees with some benefit as part of the employees’ compensation for services the employees have rendered to the subdivision.” *Id.* (citing Attorney General Opinion M-582 (1970) at 7). Provided that the arrangement constitutes part of the assistant county attorney’s compensation for official services rendered to the county and that the county receives a reasonable return for the total compensation it provides the assistant county attorney, the commissioners court may find that the arrangement serves a public purpose and does not run afoul of article III, section 52. See Letter Opinion No. 96-141 (1996) at 2.

We now examine whether a commissioners court has the authority to permit an assistant county attorney, as opposed to the county attorney, to engage in the private practice of law. We believe that it does. Article V, section 18 of the Texas Constitution establishes the commissioners court as the principle governing body of the county. Under this authority, the commissioners court has the power to determine the county budget and appropriate funds.⁵ Section 41.011 of the Government Code specifically provides the commissioners court the discretion to determine whether its county attorney may engage in private practice.

We believe that the commissioners court’s discretion extends to an assistant county attorney. Small rural counties face the same problems recruiting an assistant county attorney or assistant district attorney as when recruiting a county or district attorney. As stated in your request letter, the monetary compensation offered to an assistant is less than for a similar position in a larger county and the chances for advancement are virtually non-existent. We point out, however, that it is for the commissioners court to decide whether this particular use of funds serves a public purpose.

³See *id.*

⁴We may consider the history of the subject matter of the statute in arriving at the purpose and intent of the enactment. See *Commissioners Court v. Criminal District Attorney*, 690 S.W.2d 932, 936 (Tex. App.--Austin 1985, writ ref’d n.r.e.) (citing *Calvert v. Fort Worth Nat’l Bank*, 356 S.W.2d 918, 921 (Tex. 1962)).

⁵“The correlation of total revenue and expenditure, and apportionment of the [revenue] among the various county functions, operations, and programs, in the overall public interest, is the essence of the decisionmaking entrusted to the judgment of the Commissioners Court. There could be no clearer grant of discretionary power.” See *Commissioners Court v. Criminal District Attorney*, 690 S.W.2d 932, 936 (Tex. App.--Austin 1985, writ ref’d n.r.e.).

S U M M A R Y

A commissioners court, as the principle governing body of a county, has discretionary authority to permit an assistant county attorney to engage in the private practice of law from the official county attorney's office.

Yours very truly,

A handwritten signature in black ink that reads "Rick Gilpin". The signature is written in a cursive, flowing style.

Rick Gilpin
Deputy Chief
Opinion Committee