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March 12, 1999

RQ-0041-JC

RECEIVED

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I.D. # 40720

Opinion Committee

Elizabeth Robinson
Chair of the Opinion Committee
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

RE: Request for Opinion - May a County Attorney not subject to the Professional Prosecutors Act serve simultaneously as city attorney?

Dear Ms. Robinson:

On March 11, 1999, the attached article was published in the Alpine Avalanche (Exhibit 1). Heather Brown of the Texas Attorney General's Office was quoted as saying, "It may be legal, it may be illegal," for a county attorney to, also, provide legal services to a city.

Prior to taking office as the Brewster County Attorney I was appointed by the City Council of Alpine, Texas to perform legal services as the city attorney for the City of Alpine. Alpine would request my services on an as needed basis, and the City would pay me an hourly rate. The City did not provide me secretarial services, nor benefits.

I was elected county attorney to take office January 1, 1997. Prior to January 1, I called the Office of the Attorney General, County Affairs Division, and asked if there was any problem with my continuing contract work as the city attorney for Alpine. The County Affairs Division stated that their informal opinion was that the city attorney work was not a civil office of emolument, and therefore, I would not be violating Article XVI, Section 40, of the Texas Constitution. I took office January 1, and I continued my legal services for the City of Alpine.

Article XVI, Section 40, of the Texas Constitution states:

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“No person shall hold or exercise at the same time, more than one civil office of emolument...”

In Public Officers: Traps for the Unwary published by the Texas Attorney General’s Office we are advised that the term “civil office” has been abandoned for the term “public office” and that the generally accepted definition of “public officer” is derived from Aldine Independent School District v. Standley, 280 S.W.2d 578 (Tex. 1955) in which it was held by the Texas Supreme Court

“...the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others...”

An elected county attorney is clearly a public officer. However, it is my position that I am not a public officer when performing legal services as the city attorney for the City of Alpine.

In Attorney General Opinion JM-1266 (1990), the Attorney General said that a person is not ordinarily an officer if his or her actions are subject to control by a superior body, for in such an instance, he or she cannot be said to exercise authority “largely independent of the control of others.” Also, in Letter Opinion NO. 94-021 (1994), it was held that a person who serves in a merely advisory capacity is not an “officer.” In Letter Opinion No. 89-58, the Opinion Committee specifically held that a city attorney who serves under the direction and at the pleasure of the City Council does not hold a civil office of emolument.

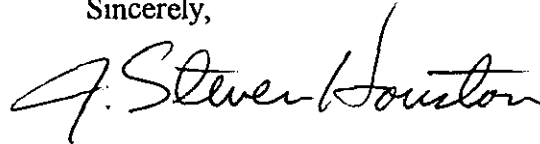
Attached is a copy of the Home Rule Charter of the City of Alpine, Texas (Exhibit 2). Section 4.04 on page 7 addresses the city attorney. 4.04(A) states that the City Council shall appoint the attorney and the attorney shall serve at the will of and be entitled to compensation established by the council. 4.04 B(1) states that the city attorney shall serve as a legal adviser to the Council in matters relating to their official duties. 4.04B(3) states that the city attorney shall perform all services incident to his position as directed by the Council. It is clear from prior Attorney General Opinions and definitions established by the Texas Supreme Court, that my performing legal services as the city attorney in the City of Alpine is not holding a civil office of emolument.

I have been informed that there is presently an opinion request (RQ-1137) in the Attorney General’s Office involving a county attorney covered by the Professional Prosecutors Act. The Brewster County Attorney is not subject to that Act and is allowed to engage in a private law practice.

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The statements of Heather Brown quoted in the newspaper article have created substantial local controversy over my integrity. Because of this, I am pursuing an opinion from your office. Your prompt attention to this matter will be greatly appreciated.

Sincerely,

A handwritten signature in black ink that reads "J. Steven Houston". The signature is written in a cursive style with a large, prominent initial "J".

J. STEVEN HOUSTON
Brewster County Attorney

JSH/lu
Enclosure
cc: The Alpine Avalanche