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OPINION COMMITTEE

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CAMERON COUNTY (DISTRICT) ATTORNEY

Armando R. Villalobos
County and District Attorney

FILE # ML-45861-08

I.D. # 45861

October 21, 2008

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

RQ-0754-GA

Re: Code of Criminal Procedure Article 2.08

Dear Mr. Abbott:

Pursuant to Section 402.043 of the Texas Government Code, Armando Villalobos, Cameron County (District) Attorney, on behalf of Bernard W. Ammerman, Willacy County (District) Attorney Elect, is requesting a formal written opinion of the Attorney General regarding the following issues.

Can an assistant county and district attorney legally and ethically practice as a criminal defense attorney in state courts in a neighboring county?

Can an assistant county and district attorney legally and ethically practice as a criminal defense attorney in federal courts?

It is respectfully suggested that these questions be answered in the affirmative.

Willacy County is a rural county that does not have the resources to offer competitive

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salaries to attract attorneys who would not have the option to practice as criminal defense attorneys in federal courts and in counties other than Willacy County. In 2000, according to the United States Census Bureau, there were 20,082 people residing in Willacy County. The median income for a household in the county was \$22,114. About 33% of the population was below the poverty line making the county one of the poorest counties in the United States.

The current Willacy County (District) Attorney does not employ an assistant county (district) attorney. But at times when the office has employed assistants, the County (District) Attorney has allowed his assistants to practice criminal defense in the neighboring counties like Cameron and Hidalgo.

Therefore, I respectfully request that the Attorney General provide a written opinion concerning if assistant county and district attorneys can legally and ethically practice as a criminal defense attorney in state courts in a neighboring county and in federal courts. The brief required by Section 402.043 of the Texas Government Code is enclosed. Thank you for your assistance in this matter.

Respectfully submitted,

Armando Villalobos

Cameron County (District) Attorney

By: 

Bernard W. Ammerman

Cameron County Assistant County (District)
Attorney

Willacy County (District) Attorney Elect

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BRIEF IN SUPPORT OF A REQUEST FOR AN ATTORNEY GENERAL'S OPINION
REGARDING ASSISTANT COUNTY (DISTRICT) ATTORNEY CAN LEGALLY
AND ETHICALLY PRACTICE AS A CRIMINAL DEFENSE ATTORNEY IN STATE
COURTS IN A NEIGHBORING COUNTY AND IN FEDERAL COURTS

A. Issue Presented

Can an assistant county and district attorney legally and ethically practice as a criminal defense attorney in state courts in a neighboring county?

Can an assistant county and district attorney legally and ethically practice as a criminal defense attorney in federal courts?

It is respectfully suggested that these questions be answered in the affirmative. The disqualification would effectively exclude the most qualified candidates for employment as an assistant county and district attorney in Willacy County.

B. Applicable Law

Code of Criminal Procedure Article 2.08 states that “[d]istrict and county attorneys shall not be of counsel adversely to the State in any case, in any court ...” Tex. Code Crim. Proc. Ann. Art. 2.08 (Vernon 1977).

C. Analysis

Article 2.08 prohibits a county and district attorneys from appearing “of counsel adversely to the State in any case, in any court.” Tex. Code Crim. Proc. Ann. Art. 2.08

(Vernon 1977). No reported court decision has determined whether Art. 2.08 would also apply to an assistant county and district attorney practicing as a criminal defense attorney in state courts in a neighboring county. Moreover, no reported court decision has determined whether Art. 2.08 would also apply to an assistant county and district attorney practicing in federal courts. Although the Legislature could have written article 2.08 to also apply to an assistant county and district attorney, it did not do so.

By its plain terms, Article 2.08 expressly disqualifies county and district attorneys from acting as counsel adversely to the state in any county, i.e. representing criminal defendants. Under the Texas Constitution, a county attorney must either be elected or appointed to serve until the next general election. Tex. Const. Art. V, § 21. Willacy County is located in the 197th Judicial District, and is not served by a district attorney. Tex. Gov't Code Ann. § 24.376(a) (Vernon 2004). Thus, the Willacy County Attorney represents the state in district and inferior courts. Tex. Const. Art. V, § 21.

Article 2.08 has been interpreted to exclude district and county attorneys who are not elected. See Tex. Att'y Gen. Op. No. GA-0241 (2004). The rationale is based on the premise that qualified attorneys with an ongoing defense practice would not accept a pro tem appointment for even a single case if such an appointment would preclude their engaging in criminal defense in any court in the state. Such exclusion has the legislative intent of opening up the pool of potential qualified candidates to perform all the duties of that office. However, a similar exclusion in Art. 2.08, to assistant county and district attorneys, as is given to appointed county and district attorneys, would result in the same legislative intent: to widen the field for qualified attorneys to seek and accept comparably low-paying assistant county and district attorney positions in financially-strapped

counties if they are allowed to practice in criminal defense capacities in neighboring counties and in federal court.

D. Conclusion

For all the foregoing reasons, we ask respectfully that the Attorney General conclude that an assistant county and district attorney can legally and ethically practice as a criminal defense attorney in state courts in a neighboring county and in federal courts.

Such an opinion would be in line with a feasible result of the legislative intent of Art.

2.08.