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**OPINION COMMITTEE**

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President Pro Tempore  
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**FLORENCE SHAPIRO**  
Texas State Senator  
District 8

March 8, 2010

FILE # ML-46351-10  
I.D. # 46377

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

**RQ-0870-GA**

Re: Request for opinion

Dear General Abbott:

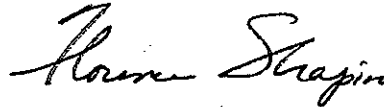
Pursuant to Section 402.042 of the Texas Government Code, I respectfully request an opinion from your office to respond to the following questions:

- (1) Whether or not the Dallas County Commissioners Court has the authority to retain independent legal counsel to represent Dallas County in civil matters where a conflict of interest exists for the Dallas County District Attorney, or where the District Attorney has refused to act?
- (2) Specifically, I request that you respond to the following questions:
  - (a) In a county with a population of over 1.25 million with only a statutory criminal district attorney, does §89.001(c) of the Texas Local Government Code give the Criminal District Attorney exclusive authority to select private or outside attorneys to represent such county in civil lawsuits brought by or against the county?
  - (b) In a county with a population of over 1.25 million with only a statutory criminal district attorney, does §89.001(c) of the Texas Local Government Code give the Criminal District Attorney exclusive authority to select private or outside attorneys to represent the county in civil lawsuits brought by or against the county where a conflict of interest exists for the District Attorney?

- (c) In a county with a population of over 1.25 million with only a statutory criminal district attorney, does the Commissioners Court have the authority to select and retain outside or private counsel to represent the county in civil lawsuits brought by or against the county without the consent or approval of the District Attorney?
- (d) As a statutory "State Prosecuting Attorney" as that term is defined and presented in §46.001(3) and §46.002(2) of the *Texas Government Code*, is the Dallas County District Attorney precluded from representing Dallas County in civil matters, and hence, not subject to the provisions of §89.001(c) of the *Texas Local Government Code*?

I respectfully submit the forgoing questions to your office for opinion. Attached, please find a document from the Dallas County Commissioners that details the factual background of and legal arguments related to this request.

Very truly yours,



Florence Shapiro  
Senator, District 8

FS/m

LAW OFFICES OF  
BURT BARR & ASSOCIATES, L.L.P.

P.O. BOX 223667  
DALLAS, TEXAS 75222-3667  
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March 10, 2010

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

Dear Attorney General Abbott:

We are counsel for the Dallas County Commissioners Court and submit the following brief in support of Senator Shapiro's inquiries to your office.

**BACKGROUND**

In order to respond to presented inquiries, it is necessary to have a background history of the circumstances giving rise to the same.

In September 2009, the Dallas County Commissioners Court hired a private investigator and his firm to investigate illegal employment practices in Dallas County offices. Specifically, the investigator was hired to conduct an investigation of alleged improper employment practices by Dallas County Constables Offices Precinct One (1) and Five (5) allegedly involving personnel issues and allegations implicating misconduct and improprieties relative to Dallas County.<sup>1</sup> The investigator was hired pursuant to a Contract that was negotiated, voted upon, and approved by the Dallas County Commissioner's Court. Shortly thereafter, the Dallas County Commissioners Court voted to hire a private attorney to provide legal advice to the Commissioners Court related to the performance of the Contract with the investigator. A legal services Attorney Fee Contract was entered into with the private attorney, voted upon, and approved by the Dallas County Commissioners Court. The Commissioners Court desired a second legal opinion on issues that arose during the civil investigation that was being conducted by the investigator, particularly in regard to the dissemination of information to the investigator in light of Public Information Act

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<sup>1</sup> In so doing to the extent necessary, the investigator was to conduct effective and efficient coordination with all Federal, State, and local law enforcement entities which have investigative interest in the investigation in order to coordinate activities and not interfere with any respective agency's individual focus or thrust.

concerns. The legal services Attorney Fee Contract was amended to expand the scope of services as follows:<sup>2</sup>

**Legal consultation, advice and representation to the COUNTY and the COUNTY Commissioners regarding the contract with [investigator] or relating to the investigation of illegal employment practices in Dallas County offices, including but not limited to, legal research; asserting legal positions and arguments; timely responding to legal inquiries; providing legal opinions; and representing the COUNTY and COUNTY Commissioners in any civil action arising out of or regarding the contract with [investigator] or relating to the investigation of illegal employment practices in Dallas County offices.**

The focus of the investigation by the investigator was an investigation into the employment practices of Dallas County Constables Precincts One (1) and Five (5). The investigation prompted the Dallas County Grand Jury to subpoena a number of individuals to testify, including, the Dallas County Judge, the Dallas County Commissioners Court Administrator, and the investigator. A number of civil lawsuits were also filed. The civil lawsuits are as follows:

- (1) Cause Number 09-014089<sup>3</sup>  
Jaime Cortes vs. Jim Foster and Danny Defenbaugh  
101<sup>st</sup> Judicial District Court  
Dallas County, Texas  
Application for temporary restraining order and suit for damages  
Date Filed: October 15, 2009
  
- (2) Cause Number 09-14986  
The Honorable Craig Watkins, In His Official Capacity As Dallas County District Attorney vs. Danny Defenbaugh; Defenbaugh & Associates, Inc.; Jim Foster, In His Official Capacity As County Judge Of Dallas County; Kenneth Mayfield, In His Official Capacity As Dallas County Commissioner District 4; and Maurine Dickey, In Her Official Capacity As Dallas County Commissioner District 1  
68<sup>th</sup> Judicial District Court  
Dallas County, Texas  
Date Filed: November 5, 2009

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<sup>2</sup> Neither this Amendment nor the original legal services Attorney Fee Contract was objected to by Dallas County Criminal District Attorney Watkins.

<sup>3</sup> A Second Amended Petition naming Dallas County Commissioners Maurine Dickey and Kenneth Mayfield was filed on or about October 29, 2009.

- (3) Cause Number 09-16600  
Alejandro Garcia, Joseph Watts, James Decoux, Leslie Willie,  
Keith Hamilton, Dedrick Miller, Tracy Robinson, Lester Smith,  
Marquette Hall, James Hembree, and Andrew Harris  
vs. Dallas County, Texas  
162<sup>nd</sup> Judicial District Court  
Dallas County, Texas  
Date Filed: December 11, 2009
- (4) Cause Number 09-16681  
Milad Nasrallah Sr. and Dowdy Ferry Auto Services, Incorporated  
vs. Jim Foster  
191<sup>st</sup> Judicial District Court  
Dallas County, Texas  
Date Filed: December 14, 2009
- Cause Number 09-15537  
Milad Nasrallah, Sr. vs. Dallas County, Texas  
298<sup>th</sup> Judicial District Court  
Dallas County, Texas  
Date Filed: November 18, 2009
- (5) Cause Number 10-00768  
Lois Martin vs. The County Of Dallas and Mario Guevara  
192<sup>nd</sup> Judicial District Court  
Dallas County, Texas  
Date Filed: January 21, 2010

Jaime Cortes is the current Dallas County Constable Precinct Five (5). In this lawsuit, Mr. Cortes sought injunctive relief seeking return of the computer hard-drives that were removed from computers belonging to Dallas County that were in his offices. The hard-drives were taken and replaced as part of the ongoing investigation into employment practices. In the lawsuit, Mr. Cortes also sought recovery for damages flowing from alleged acts of defamation, conversion, and trespass, among other claims and causes of action. The District Attorney declined to defend County Judge Foster and the County Commissioners. The Commissioners are being defended in that case by a private firm pursuant to the herein described Attorney Fee Contract. Judge Foster is also being defended by private counsel. On February 15, 2010, Mr. Cortes voluntarily agreed to non-suit his case after testifying for approximately four (4) hours in a deposition that he was required to attend pursuant to Court Order. As is evident on the face of the of the Original, First, and Second Amended Petitions, it is clear that Mr. Cortes sought the legal advice of the Dallas County Criminal District Attorney regarding the subject matter made the basis of his action against the investigator, the Dallas County Judge, and the Dallas County Commissioners. Constable Cortes also admitted in a legal forum during the deposition process that he sought and

received the advice of the Dallas County Criminal District Attorney regarding these matters and other matters relating to the employment practices investigation.

The Watkins lawsuit was an attempt by Dallas County Criminal District Attorney Watkins acting in his official capacity as the Dallas County Criminal District Attorney to secure injunctive relief to stop the investigation being pursued by the Dallas County Commissioners Court. The lawsuit was filed on behalf of Watkins by Dallas County Assistant Criminal District Attorney Robert Schell. The Dallas County Criminal District Attorney opted to Non-Suit this lawsuit and a formal Order of Non-Suit was filed on December 3, 2009. However, it must be pointed out that Mr. Schell, the attorney who filed this lawsuit on behalf of Watkins, is the designated attorney from the Dallas County Civil Division who regularly sits at the open meetings of the Dallas County Commissioners Court and provides legal advice to the Commissioner's Court. By filing this lawsuit, Mr. Schell was in essence suing his own client at the behest of the Dallas County Criminal District Attorney.<sup>4</sup> Equally troublesome, is that in the Watkins lawsuit, Mr. Schell attached as an Exhibit to the pleading a purported sealed document containing excerpts of the Grand Jury testimony given by the investigator, Dallas County Judge, and Dallas County Commissioners' Court Administrator.<sup>5</sup> This testimony related to an investigation of the Dallas County Grand Jury into matters at hand and an investigation which remains ongoing as of this date.

The Alejandro Garcia, et. al. is a lawsuit ("Constables Lawsuit") brought by current and former Dallas County Deputy Constables assigned to Precincts One (1) or Five (5). In this lawsuit, eleven (11) former or current Dallas County Constables assigned to Precincts One (1) and Five (5) are seeking recovery for damages because of alleged civil employment practice abuses and violation of constitutional rights, among other claims and causes of action. The subject matter of this lawsuit encompasses the very concerns that the Dallas County Commissioners Court were investigating in order to preclude the prospect of civil litigation such as the Constables Lawsuit. Dallas County Criminal District Attorney Watkins declined to handle the litigation and the Dallas County Commissioners Court retained the same law firm to represent Dallas County, as the matter fell within the scope of the legal services Attorney Fee

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<sup>4</sup> Not only has Mr. Schell served as the attorney to the Dallas County Commissioners Court and regularly offers advice and opinions to the Dallas County Commissioners Court, we understand the Dallas County Constables for Precincts Five (5) and One (1) have sought and received advice from the Dallas County Criminal District Attorney regarding the very employment practices that are the subject matter of the ongoing investigation by the Dallas County Commissioners Court. It is the offices of these constables that are being investigated by the Dallas County Commissioners Court and the subject of an ongoing Grand Jury investigation.

<sup>5</sup> We have grave concerns that the use of the Grand Jury testimony may be in violation of the restricted uses of Grand Jury testimony set forth in the *Texas Code of Criminal Procedure*. See *Tex. Code Crim. Proc.* §20.02 (c), (g). See also, *Stern vs. State Ex. Rel. Ansel*, 869 S.W.2d 614, 622 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1994, writ denied) ("We find it compelling to note that in each instance in which disclosure may be obtained, it may only be obtained by *judicial order*. We find no case in the jurisprudence of this state that suggests that a prosecutor, court reporter, or any other individual, may unilaterally disclose the contents of grand jury testimony while a grand jury investigation is in process.").

Contract discussed herein. While Dallas County Criminal District Attorney Watkins declines to be involved in the representation of the County in this lawsuit, he has yet to consent to the retention of the private firm; instead, Dallas County Criminal District Attorney Watkins suggested to Dallas County Auditor Virginia Porter that the Dallas County Commissioners Court does not have authority to act, that the initial legal services Attorney Fee Contract was entered into in violation of the law, and that the Dallas County Auditor is not in a position to approve an invoice for payment on a contract.

The lawsuit filed under Cause Number 09-16681 was filed on or about December 14, 2009 by Milad Nasrallah, Sr. and Dowdy Ferry Towing Services, Incorporated ("Dowdy Ferry Lawsuit" or "Dowdy Ferry"). In this lawsuit, Dowdy Ferry is suing Judge Foster in his individual capacity and is seeking recovery for damages for alleged business disparagement and tortious interference with business contracts that Dowdy Ferry had with Dallas County Constables Precincts One (1) and Five (5). The Dallas County Commissioners Court retained the same private law firm as noted herein to represent the interests of Foster as the subject matter of the litigation fell within the scope of the Attorney Fee Contract. Dallas County Criminal District Attorney Watkins has yet to consent to representation by the private firm, but likewise has also not objected to representation.<sup>6</sup>

The Lois Martin lawsuit is a sexual harassment lawsuit filed against the Dallas County and Mario Guevara, a deputy constable in Precinct 5. At the time of the occurrences made the basis of the Lois Martin lawsuit, Ms. Martin worked in the Civil Division of Precinct 5 under the supervision of Mario Guevara who worked under the direction of Dallas County Precinct 5 Constable Cortes. Plaintiff Martin was sexually harassed at the workplace by Guevara and suffered retaliation when his advances were refused. This is a new lawsuit and Dallas County and Mario Guevara have only recently been served. It is unknown at this time who will be representing the Defendants in this case and the position of the Dallas County Criminal District Attorney as to the same.

Dallas County Criminal District Attorney Watkins through his Civil Division has taken positions adverse to his client, Dallas County Commissioners Court and/or County Judge Jim Foster and/or the Dallas County Commissioners. For example, Dallas County Criminal District Attorney Watkins by and through the Civil Division, without the knowledge and consent of the Dallas County Commissioners Court or Dallas County Judge, accepted service and appeared on behalf of Dallas County Judge Foster in a mandamus proceeding filed by the Dallas County Democratic Party against Dallas County Judge Foster in his lawful capacity and others. In addition to accepting service and entering an appearance on behalf of Dallas County Judge

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<sup>6</sup> On November 18, 2009, Milad Nasrallah, Sr. filed a lawsuit against Dallas County, Texas for injunctive relief under Cause Number 09-15537 in the 298<sup>th</sup> Judicial District Court of Dallas County, Texas. This is a lawsuit that was filed by Nasrallah to refrain Dallas County from accepting bids from other companies for towing contracts. Dallas County Criminal District Attorney Watkins through Civil Division Attorney Robert Schell is currently defending this action. We understand that the lawsuit may fall within the scope of the Attorney Fee Contract with the private law firm.

Foster without his knowledge and consent, the Dallas County Criminal District Attorney through his assistants entered into Rule 11 Agreements respecting a temporary restraining order with opposing counsel – all without the knowledge and consent of the Dallas County Commissioners Court or the Dallas County Judge and without moving the Court to dismiss for want of jurisdiction.<sup>7</sup>

In another matter, the Dallas County Commissioners Court, in executive session, discussed their concerns and sought legal advice of Robert Schell, Dallas County Criminal District Attorney Civil Section Chief, respecting the Dallas Sheriff's Department's intent to contract with the Discovery Channel to enter the Dallas County jail, a county building to film inmates in their daily interactions - all in contravention of Dallas County policies related to use of Dallas County buildings. The Court asked Mr. Schell to proceed with seeking an injunction. Mr. Schell consulted with the Commissioners, discussed legal positions, and was privy to confidential communications. The Dallas County Commissioners Court was prepared to move forward by seeking an injunction against the Sheriff. After engaging in these conversations and offering advice to the Dallas County Commissioner's Court, Mr. Schell informed the Court that he was going to represent the Sheriff and would not prosecute the injunction suit. The Commissioners Court filed their injunction suit and, thereafter, Mr. Schell entered an appearance on behalf of the Sheriff and defended the Sheriff in the injunction suit.<sup>8</sup>

The failure of the Dallas County Criminal District Attorney to recognize legal conflicts of interest, protect client confidences, and the desire to have protected attorney-client communications inspired the Dallas County Commissioners Court to retain outside/independent lawyers.

Attorney General Abbott, it is a matter of great concern that there is not only an apparent conflict, but an actual conflict of interest between the offices of the Dallas County Criminal District Attorney Watkins and his client the Dallas County Commissioners Court, the Dallas County Commissioners, and the Dallas County Judge. The conflict of interest is arguably in violation of *Texas Disciplinary Rules of Professional Conduct*, particularly Rule 1.06, Rule 1.09, and Rule 3.08. The Dallas County Commissioners and the Dallas County Judge should be permitted to employ counsel of their choice. It is also a matter of concern that Dallas County Criminal District Attorney Watkins considers it his statutory obligation to represent Dallas County in all civil litigation matters when we have not uncovered a statute that so authorizes him to act.

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<sup>7</sup> In the elections dispute case, District Court does not have jurisdiction to entertain an election dispute. That jurisdiction may lie with the Texas House of Representatives. Moreover, in an original mandamus proceeding arising under the *Texas Election Code* mandamus jurisdiction lies in the Texas Supreme Court or the Court of Appeals – not the District Court.

<sup>8</sup> Not only do the actions of the Dallas County District Criminal District Attorney and his assistant Robert Schell represent a conflict of interest, the actions appear to be in probable violation of §157.901 and §157.9015 of the *Texas Local Government Code*. The sheriff, by statute §157.9015 *Texas Local Government Code*, can not contract in this capacity; the Commissioner's Court has exclusive domain in this regard.



## ARGUMENT AND AUTHORITIES

### HISTORICAL PERSPECTIVE

The Texas Constitution empowers and sets forth the scope of authority of County Commissioners' Courts in the State of Texas. Article 5, Section 18(b) of the Texas Constitution, expressly states that "... The County Commissioners so chosen, with the County Judge as the presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed...". The Texas Supreme Court has opined upon the constitutional scope of authority County Commissioner's Court in *Guynes vs. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993) as follows:

"...This provision has been interpreted to mean that although a commissioners court may exercise broad discretion in conducting county business, the legal basis for any action taken must be grounded ultimately in the constitutions or statutes. *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451, 453 (Tex. 1948); *Renfro v. Shropshire*, 566 S.W.2d 688, 690 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) As the administrative head of county government, a commissioners court also possess broad implied powers to accomplish its legitimate directives. *Prichard & Abbott v. McKenna*, 162 Tex. 617, 350 S.W.2d 333, 334 (Tex. 1961); *Anderson v. Wood*, 137 Tex. 201, 152 S.W.2d 1084, 1085 (Tex. 1941); *Galveston County v. Gresham*, 220 S.W. 560, 562 (Tex. Civ. App. – Galveston 1920, writ ref'd). These powers include the authority to contract with experts when necessary, including attorneys. See *Pritchard & Abbott*, 350 S.W.2d at 334; *McClintock & Robertson vs. Cottle County*, 127 S.W.2d 319, 321 (Tex. Civ. App. – Amarillo 1939, writ dism'd judgm't cor.)..."

The Texas Supreme Court in *Guynes* at 861 S.W.2d at 863 further opines that

"...the courts of this state have for the last century upheld the power of a commissioners court to hire counsel to assist it or other officials in carrying out their responsibilities so long as the statutory duties of other county officials are not thereby usurped. e.g. *Terrell v. Greene*, 88 Tex. 539, 31 S.W. 631, 633 (Tex. 1895); *Maud v. Terrell*, 109 Tex. 97, 200 S.W. 375, 376 (Tex. 1918); *Seagler*, 238 S.W. at 708. As long as the commissioners court does not impinge on the statutory duties of other officials, it retains the implied power to control the litigation and choose its legal remedies. See *Looscan v. The County of Harris*, 58 Tex. 511, 514 (1883); *Terrell v. Greene*, 31 S.W. at 633; *Travis County v. Matthews*, 235 S.W.2d 691, 697 (Tex. Civ. App. – Austin 1950, writ ref'd n.r.e.). Moreover, county and district attorneys are charged primarily with enforcement of the criminal statutes, *Brady v. Brooks*, 99 Tex. 366, 89 S.W. 1052, 1056 (Tex. 1905), and 'it is not one of their prescribed legal duties to represent the county in its general legal business or the conduct of ordinary civil actions...' *Hill Farm, Inc. v. Hill*

*County*, 425 S.W.2d 414, 419 (Tex. Civ. App. – Waco 1968), *aff'd*, 436 S.W.2d 320 (Tex. 1969)...”<sup>9</sup>

**LACK OF STATUTORY AUTHORITY TO REPRESENT COUNTY IN CIVIL MATTERS**

Dallas County does not have a County Attorney, but a Criminal District Attorney. The enabling statute that outlines the scope of authority for the Dallas County Criminal District Attorney is outlined in §44.157 of the *Texas Government Code*. That statute provides in pertinent part in §44.157(a) that “...The criminal district attorney has exclusive control of criminal cases and all cases heard on habeas corpus in the courts of Dallas County and serves as the district attorney of all the district courts in Dallas County...”. The statute further provides in §44.157(b) of the *Texas Government Code* that “...the criminal district attorney has all the powers, duties, and privileges in Dallas County that are conferred by laws on county and district attorneys in the various counties and districts...”. While the Dallas County Criminal District Attorney has the exclusive duty to represent the state in criminal matters, §44.157 does not impose a corresponding exclusive duty to represent the county in civil matters.<sup>10</sup> As a matter of fact, as of this date, we are not aware of and have not located a statute that grants the Dallas County Criminal District Attorney complete authority to represent Dallas County exclusively in all civil litigation, though the Dallas County Commissioners Court has in the past referred civil matters to the office of the Dallas County Criminal District Attorney for handling.<sup>11</sup> Thus, the Commissioners Court recognizes that as long as it is not intruding on the Dallas County Criminal District Attorney’s duties under specific statutes mandating representation of the State by the county or district attorney, the Commissioners Court may hire and retain outside attorneys of its choosing to represent the County in general civil litigation.

In addition to lacking an enabling statute that would grant the Dallas County Criminal District Attorney exclusive authority to represent Dallas County in civil litigated matters, the

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<sup>9</sup> Also see *Adams vs. Seagler*, 112 Tex. 583, 250 S.W. 413 (Tex. 1923) which also stands for the proposition that a commissioner’s court can hire outside counsel to represent the County in civil matters without usurping the powers and duties of a criminal district attorney or county attorney.

<sup>10</sup> The Texas Supreme Court in *Gwynes* reviewed §44.184 of the Texas Government Code pertaining to the authority of the Galveston County Criminal District Attorney. §44.184 is similar to §44.157 and contains an identical provision as §44.157(b). §44.184(a) provides in pertinent part that the Galveston County Criminal District Attorney “...shall represent the state in all criminal matters before those courts...and shall represent Galveston County in any court in which the county has pending business...”. §44.184(b) is identical to §44.157(b). The Texas Supreme Court interpreted §44.184 of the Texas Government Code to mean that Galveston County Criminal District Attorney has the exclusive authority to represent Galveston County in criminal matters, but not civil. *Gwynes* at 861 S.W.2d at 864.

<sup>11</sup> This does not mean that the Commissioners Court does not recognize that there are statutory provisions that mandate representation of the State in civil matters by the county or district attorney. For example, the Commissioners Court recognizes that Chapter 87 of the Texas Local Government Code requires the county attorney to prosecute ouster proceedings, and Chapter 571 of the Texas Health & Safety Code requires the county or district attorney to represent the State in mental health proceedings. However, there is no statutory requirement that applies to all civil litigation involving a county.

Dallas County Criminal District Attorney is statutorily defined as a "State Prosecutor". §46.001 of the *Texas Government Code* defines a "State Prosecutor" as a "...district attorney, criminal attorney, or county attorney performing the duties of district attorney in a district or county listed in Section 46.002...". §46.002(2) of the *Texas Government Code* identifies the Criminal District Attorney of Dallas County as being a professional prosecutor subject to the provisions of Chapter 46 of the *Texas Government Code* entitled Professional Prosecutors. §41.102 of the *Texas Government Code* provides statutory guidance as to the type of assistants and personnel that might be employed by a prosecuting attorney. §41.102(a) of the *Texas Government Code* provides that "... a prosecuting attorney may employ the assistant prosecuting attorneys, investigators, secretaries, and other office personnel that in his judgment are required for the proper and efficient operation and administration of the office...". This statute is self-limiting to prosecuting attorneys and does not extend to handling of civil litigated matters or allow the appointment of attorneys to handle civil matters.

#### **RECOGNITION OF AUTHORITY OF COUNTY COMMISSIONER'S COURT**

Both the Attorney General and the Texas Supreme Court have determined that a commissioner's court has the explicit authority to hire outside counsel to represent the County in civil matters without usurping the powers and duties of a criminal district attorney or county attorney. *See, Adams v. Seagler*, 112 Tex. 583, 25 S.W. 413 (Tex. 1923); *Guynes v. Galveston County*, 861 S.W.2d 861 (Tex.1993); Texas Attorney General Opinion Number GA-0153(2004) (concluding that Fannin County Commissioners Court could employ its own legal counsel without the consent of the Fannin County attorney); Texas Attorney General Opinion Number LO-97-011 (1997) (district or county attorney for Midland County is not required to represent Midland County in general civil litigation). These opinions are based on the interpretation of the provisions in the *Texas Government Code* applicable to the statutory county, district, or criminal district attorneys in each County. Dallas County does not have a county attorney with the statutorily-prescribed duties of representing the county in civil matters. Dallas County only has a Criminal District Attorney. Section 44.157 of the Texas Government Code, the statute applicable to the Dallas County Criminal District Attorney, does not confer any exclusive duty on the Dallas County Criminal District Attorney to represent Dallas County in civil matters. § 44.157 *Texas Government Code*. Based on the Texas Supreme Court's reasoning in *Guynes*, 861 S.W.2d 861, § 44.157(b) cannot be interpreted to mean that the Dallas County Criminal District Attorney has a primary duty to represent the County civil matters just like county attorneys in other counties such as Harris County or El Paso County. *See* § 45.201 and §45.171 of the *Texas Government Code*; *Guynes*, 861 S.W.2d at 863 (§ 44.184(b); applicable to the Galveston County Criminal District Attorney, has the same language as § 44.157(b) that the criminal district attorney has all the powers, duties, and privileges that are conferred by law on county and district attorneys in the various counties and districts). The *Adams* court held, "The Commissioner's Court, as the executive head of the financial and business affairs of the county, has the power and authority to employ attorneys to prosecute suits in favor of the county or to defend suits against the county, and to pay for such service out of county funds, when, in the discretion of the

Honorable Greg Abbott  
Attorney General of Texas  
March 10, 2010  
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members of said court, such employment is necessary to protect the interest of the county." *Adams v. Seagler*, 112 Tex. 583, 25 S.W. 413 (Tex. 1923).

Texas law recognizes that the Dallas County Commissioners Court has the authority to hire outside counsel to represent the County in civil litigation. Dallas County is a county with a population of over 1.25 million, and, therefore, there is no dispute that § 89.001 *Texas Local Government Code* applies to the Dallas County Commissioners Court. Pursuant to § 89.001(a), the Commissioner's Court has the statutory authority to hire outside counsel to represent the County in civil lawsuits against the County. The question for the Attorney General to answer is whether § 89.001(c) restricts this authority by preventing the Commissioner's Court from selecting the outside counsel which the Commissioners Court has the authority to hire in situations in which the Dallas County Criminal District Attorney is not statutorily empowered to represent the County exclusively in civil matters, or in situations in which there is a conflict of interest, and/or in situations in which legal skills and expertise are required beyond the capabilities of the Civil Division of the office of the Dallas County Criminal District Attorney.

On behalf of the Dallas County Commissioners Court, we respectfully request a response to the questions presented by Senator Shapiro and that this letter brief in support thereof be considered.

Very truly yours,  
BURT BARR & ASSOCIATES, L.L.P.

  
Patricia Kay Dube, P.C.



**DALLAS COUNTY**  
COUNTY AUDITOR

**RECEIVED**

FEB 24 2010

**OPINION COMMITTEE**

FILE # ML-46351-1c  
I.D. # 46351

February 23, 2010

To: The Honorable Greg Abbott  
Attorney General of Texas  
% Nancy Fuller, Chair Opinions Committee  
P.O. Box 12548  
Austin, TX 78711

**RQ-0870-GA**

From: Virginia Porter, Dallas County Auditor

**Questions presented:**

- 1) May the Dallas County Commissioners retain private counsel for advice on legal matters and court representation on civil matters without the express consent of the Dallas County District Attorney?
- 2) Does the Dallas County District Attorney have exclusive duty to represent the County in all matters in any district court (civil or criminal) in Dallas County?
- 3) Is a contract for private counsel representing the County negotiated by Dallas County's Commissioners Court, without approval of the District Attorney, lawfully made or null and void?

Dear Attorney General Abbot,

The Dallas County Commissioners have executed a contract and retained the services of private counsel for legal advice and representation of the County "in any civil action relating to the investigation of illegal employment practices in Dallas County offices". Funding for this private counsel is paid from the general fund. Dallas County has a criminal district attorney, with other powers and duties conferred by law. See Tex. Govt. C. §44.157 and TLG 89.001. A September 2009 contract, modified in November 2009, is signed by the County Judge and does not reflect any signature of the District Attorney. In other instances, contracts with private counsel for legal advice and representation on specific cases were signed by representatives of the District Attorney and further ordered by Commissioners Court. The Dallas County Commissioners Court is confident of their right to employ private counsel and discount the

applicability of any concurrence by the District Attorney for civil actions. According to Tex. Govt. Code §89.001, the District Attorney is required by law to "select the special counsel...subject to the [Commissioners C]ourt's approval." Further, Texas Government Code §44.157 states "the criminal district attorney...serves as the district attorney of all the district courts of Dallas County." Recently, the Dallas County District Attorney advised the Commissioners Court that for the court ordered contract of November 2009, the District Attorney did not select the counsel for representation of a specific civil case, and that the County Auditor may not pay for those services. The Commissioners Court has made known that research provided by private counsel supports their position that the District Attorney does not have exclusive duty to represent Commissioners Court in civil matters, and the Commissioners Court intends to retain said private counsel and pay expenses from the County's general fund. However, a county commissioners court may exercise only those powers that the state constitution or statutes confer upon it, either explicitly or implicitly (see Texas Constitution Art. V §18).

**The question presented is whether, in light of express constitutional and statutory assignments of duties, the Commissioners Court may retain private counsel, establishing terms and scope, without the express consent of the duly elected District Attorney, to represent the County on civil matters.**

A somewhat analogous situation was presented in *Guynes v. Galveston County et al.*, 861 S.W.2d 861 (Tex. 1993). There the Texas Supreme Court noted that "courts of this state have for the last century upheld the power of a commissioners' court to hire counsel to assist it or other officials in carrying out their responsibilities so long as the statutory duties of other county officials are not thereby usurped." *Guynes*, 861 S.W.2d at 863 (citations omitted). Further, "county and district attorneys are charged primarily with enforcement of the criminal statutes and, 'it is not one of their prescribed legal duties to represent the county in its general legal business or the conduct of ordinary civil actions.'" *Guynes*, 861 S.W.2d at 864, citing *Hill Farm, Inc. v. Hill County*, 425 S.W.2d 414, 419 (Tex. Civ. App. - Waco 1968), *aff'd.*, 436 S.W.2d 320 (Tex. 1969). As referenced in GA-153, "The *Guynes* court expressly reserved the question of

'limitations [that] might be imposed on the present arrangement should the criminal district attorney withdraw his consent.'"

Differences in authoritative wording for Galveston County and for Dallas County both with a criminal district attorney as promulgated in Tex. Govt. Code §44.184 and §44.157, is "shall exclusively represent the state in all criminal matters...and shall represent Galveston County in any court in which the county has pending business" compared to "has exclusive control of criminal cases...and serves as the district attorney of all the district courts in Dallas County". Further, there appears to have been an express consent by the criminal district attorney for Galveston Commissioners Court's retention of the private counsel. (*Guynes*, 861 S.W.2d at 864.) In Dallas County's situation, consent from the District Attorney has not been expressed.

Texas Local Government Code §89.001 states in pertinent part that:

- a) The commissioners court of a county with a population of more than 1.25 million may employ an attorney as special counsel.
- b) The special counsel may be employed to:
  - 1) represent the county in any suit brought by or against the county;...
- c) **The county attorney shall select the special counsel.** If the county does not have a county attorney, the district attorney or criminal district attorney shall select the special counsel. The selecting officer shall determine the terms and duration of employment of the special counsel, subject to the court's approval. (Tex. Loc. Govt. Code Ann. §89.001 (Vernon 1988)).

Further, Texas Government Code §44.157 states:

- DALLAS COUNTY.** (a) The criminal district attorney of Dallas County shall attend every term of the Criminal Court of Dallas County and of the Criminal District Court No. 2 of Dallas County and shall represent the state in all matters before those courts. **The criminal district attorney has exclusive control of criminal cases and all cases heard on habeas corpus in the courts of Dallas County and serves as the district attorney of all the district courts in Dallas County.**
- b) The criminal district attorney has all the powers, duties, and privileges in Dallas County that are conferred by law on county and district attorneys in the various counties and districts.
  - c) The criminal district attorney shall collect the fees...
  - d) No other person may perform a duty of the criminal district attorney as provided by this section unless the criminal district attorney and his assistants are absent from the county or refuse or are unable to perform the duty. (Tex. Govt. Code Ann. §44.157 (Vernon 1988))

Dallas County Auditor/opinion request

Strict interpretations of statutes indicates that the Commissioners Court's actions usurp the District Attorney's exclusive constitutional and statutory authority. Section 113.064 (a) of Local Government Code prohibits a county from paying any claim, bill or account until the county auditor has examined and approved payment. Section 113.065 of Local Government Code permits a county auditor to approve only those claims that have been "incurred as provided by law". GA-0247 concludes a county auditor may not approve a claim for payment on a contract that was entered into in violation of the law.

Other cites where your office's predecessor has previously addressed this issue: "It is our considered opinion that the law does not intend that the Commissioners Court shall employ counsel on a salary basis to advise and represent it in whatever matters might arise." Op. Atty. Gen. 1946, No. 0-7474. See also Op. Atty. Gen. 1990, No. JM-1281 ("It has been consistently held that the commissioners['] court is not authorized to interfere with the county attorney's general statutory duty to advise and represent county and precinct officers.") Op. Atty. Gen. 2004, No. GA-153 ("Provided that it does not delegate duties constitutionally or statutorily vested in the county attorney's office...commissioners court may employ legal counsel to advise and represent it in civil matters, without securing the county attorney's consent.")

Your office's input and opinion on these matters, in as expeditious manner as possible, would be greatly appreciated.

Sincerely,



Virginia Porter  
Dallas County Auditor

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509 Main Street, Suite 407  
(214) 653-6472

Dallas, TX 75202  
fax (214) 653-6440





# DALLAS COUNTY

CRAIG WATKINS  
DISTRICT ATTORNEY  
CIVIL DIVISION

January 20, 2010

Dallas County Commissioners Court  
Administration Building  
411 Elm St.  
Dallas, TX 75202

Re: *Alejandro Garcia, et al vs. Dallas County, Texas*  
Cause No. 09-16600; 162<sup>nd</sup> Judicial District Court of Dallas County, Texas

Dear County Judge and Commissioners:

As you are aware, Dallas County was sued in the above-referenced matter. The suit was filed on December 11, 2009. The law firm of Touchstone Bernays was notified of the suit and filed an answer on behalf of Dallas County. However, Touchstone Bernays was not properly retained, has no authority to represent Dallas County, and therefore, any fee bills submitted by the firm cannot legally be paid by the Dallas County Auditor.

Texas Local Government Code § 89.001 states in pertinent part that:

- (a) The commissioners court of a county with a population of more than 1.25 million may employ an attorney as special counsel.
- (b) The special counsel may be employed to:
  - (1) represent the county in any suit brought by or against the county;...
- (c) The county attorney shall select the special counsel. If the county does not have a county attorney, the district attorney or criminal district attorney shall select the special counsel. The selecting officer shall determine the terms and duration of employment of the special counsel, subject to the court's approval.

TEX. LOC. GOV'T CODE ANN. § 89.001 (Vernon 1988).

Further, Texas Government Code § 44.157 states:

DALLAS COUNTY. (a)The criminal district attorney of Dallas County shall attend every term of the Criminal Court of Dallas County and of the Criminal District Court No. 2 of Dallas County and shall represent the state in all matters before those courts. The criminal district attorney has exclusive control of criminal cases and all cases heard on habeas corpus in the courts of Dallas County and serves as the district attorney of all the district courts in Dallas County.

(b) The criminal district attorney has all the powers, duties, and privileges in Dallas County that are conferred by law on county and district attorneys in the various counties and districts.

(c) The criminal district attorney shall collect the fees and commissions that are provided by law for similar services rendered by a district or county attorney. Not earlier than December 1 and not later than December 31 of each year, the criminal district attorney shall make a complete report to the county judge of Dallas County of the fees collected by the criminal district attorney.

(d) No other person may perform a duty of the criminal district attorney as provided by this section unless the criminal district attorney and his assistants are absent from the county or refuse or are unable to perform the duty.

TEX. GOV'T CODE ANN. § 44.157 (Version 1988).

It is clear that the Dallas County Criminal District Attorney has exclusive jurisdiction in all litigation matters, both criminal and civil, involving Dallas County. I have all the same exclusive grants of jurisdiction as any other district or county attorney in the state of Texas. See §44.157 (b). I have all the same exclusive jurisdiction of civil matters as does the Harris County Attorney under TEX. GOV'T CODE ANN. § 45.201 (Vernon 2004). The case of *Driscoll v. Harris County Com'rs Court*, 877 S.W.2d 856 (Tex-App.-Hous. (14 Dist) 1984), applies equally to my office as it does to the Harris County Attorney by virtue of the law. Any reliance on *Driscoll* for any other result is misplaced.

Employing an attorney without the consent of the District Attorney. "intrude[s] upon [the] statutory duties under Government Code § 44.157, which governs the office of Criminal District Attorney for Dallas County. Local Government Code § 89.001 requires [the District Attorney's] selection of any special counsel for any litigation matter brought by or against Dallas County. However, in this matter, the Dallas County District Attorney did not "select the special counsel" and "determine the terms and duration of employment of the special counsel" prior to the court's approval as statutorily required. Therefore, Touchstone Bernays was not properly retained to represent Dallas County. As a result, fee bills submitted by the firm to the auditor cannot be legally paid.

Moreover, Touchstone Bernays contractually "must never accept service on behalf of [Dallas] County." That is a standard provision of all Dallas County attorney fee contracts. An amendment to that contract may not be legal since service on Dallas County must be made upon the County Judge by law. Tex. Civ. Prac. & Rem. Code §17.024 (a). A county may only do that which it is authorized by law. *Anderson v. Wood*, 152 S.W. 2d 1084 (Tex. 1941). There is no statutory authority for a county to waive service of process or approve acceptance of service by an attorney who has not made an appearance in a suit in which the county is a party. Thus, Dallas County was not properly served and Touchstone Bernays did not have authority to accept service nor file an answer on behalf of Dallas County.

A resolution must now be reached to bring the County in compliance with the law and provide fair treatment to the firm for its services. I propose the following:

- I will select Touchstone Bernays as special counsel for *Alejandro Garcia, et al vs. Dallas County, Texas*, for all services performed up to the date of this letter.

correct cite  
688 S.W.2d 369

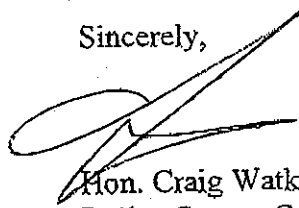
- Since the Commissioners Court negotiated a contract in violation of the statute, this contract must be renegotiated. Therefore, I will negotiate a new contract with Touchstone Bernays for representation of the County in this matter.
- If agreeable terms are reached, I will select Touchstone Bernays to represent the County in this case and the new contract will be submitted to the Commissioners Court for approval.
- It is my intent to restore the historical procedure and spirit of cooperation with the members of the Commissioners Court for the selection and employment of all special counsel from this date forward.

I believe this resolution is in the best interest of Dallas County in that it will result in compliance with §89.001 and thus, ensure that the firm will be fairly compensated for the services it renders, and therefore, avoid any exposure to a claim against the County by Touchstone Bernays for the non-payment of its fees. I would hope that in the future the Commissioners Court will follow the law and respect the statutory responsibilities and independent authority of the District Attorney. Finally, this resolution will rekindle the cooperation between our offices that is expected by the citizens of Dallas County.

Please let me know at your earliest convenience how we may proceed.

Thank you for your time and attention to these matters.

Sincerely,



Hon. Craig Watkins  
Dallas County Criminal District Attorney

cc: Virginia Porter, Dallas County Auditor  
Darryl Martin, County Administrator