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RQ-1039-GA

January 31, 2011

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

Attn: AG Opinion Request

RE: **Attorney General Opinion Request**
Official Court Reporter Salary

Hon. Greg Abbott,

As the Van Zandt County Criminal District Attorney, I am respectfully requesting a legal opinion regarding the following issues:

Issue (1) Presented: Which entity/individual has the final authority to set the salary of the official court reporter in the County Court of Law in Van Zandt County?

Issue (2) Presented: Which entity/individual has the final authority to determine if an official court reporter position in the County Court at Law will be full-time or part time position?

Background

Prior to the adoption of the FY2012 budget, the Hon. Judge Randal L. McDonald, of the Van Zandt County Court at Law, (hereinafter referred to as CCL) recommended the salary of his official court reporter to be set at $48,006.40. Subsequently, the Commissioners' Court of Van Zandt County (hereinafter referred to as Commissioners) adopted a budget for the FY2012 that allocated funding ($24,000.00) for a court reporter on a contract or part-time basis. Based on the action of the commissioners' court regarding said official court reporter, Judge McDonald issued an order that directed the county commissioners and county judge of Van Zandt County, individually and as a body comprising the Commissioners' Court of Van Zandt County, rescind their order designating the position of Official Court Reporter for this Court as a part-time contract labor position, return the position to a full time salaried position with benefits, and approve the salary for the Official Court Reporter at $48,006.40 per year plus the same benefits provided to other full time non-exempt salaried employees of the County, effective October 1, 2011. (*In Re Shelly Crossland, Order* – Exhibit 1)

Legal Arguments

The Commissioners argue that the official court reporter of the Van Zandt County Court at Law is entitled to receive a salary set by the judge of the county court at law *with the approval of the commissioners' court.* (Texas Gov't Code § 25.2362(g)). The commissioners' court of a county shall set the amount of the compensation, office and travel expenses, and all other allowances for county and precinct officers and employees who are paid wholly from county funds. (Local Gov't Code § 152.011). No provision fixes a salary for a county court reporter that must be paid without regard to the amount of time required to perform the duties of the position. Instead, the

commissioners' court sets the salary of the court reporter in accordance with chapter 152, subchapter B of the Local Government Code, formerly article 3912, V.T.C.S., A.G. Opinion MW-487 (1982). The commissioners' court may set a salary commensurate with the number of hours worked. (Tex. Att'y Gen. Op. Nos. GA-0372 (2005); JM-1083 (1989); MW 487 (1982)).

Furthermore, there is no requirement that the position of official court reporter must be a full-time position. (Tex. Att'y Gen. Op. Nos. GA-0372 (2005); GA-0164 (2004); GA-0155 (2004); JM-1083 (1989); MW-487 (1982)). The position of court reporter is described in terms of the duties to be performed, not of the number of hours of service required each week. The number of hours required to perform the job will depend upon the number of sessions the court reporter is requested to attend, record, and reduce to a written transcript and is likely to reflect the workload of the court with which the reporter is associated. (Tex. Att'y Gen. Op. Nos. GA-0372 (2005); JM-1083 (1989); MW-487 (1982)).

The CCL argues that the Commissioners acted outside of their statutory authority by eliminating a statutorily mandated and appointed position as a salaried position. The CCL also argues that the Commissioners acted in an arbitrary and capricious manner in designating the position of official court reporter as a part-time contract labor position with an unreasonable salary that unduly interferes with the ability of the Court to efficiently and effectively fulfill is constitutional and statutory functions. The CCL cites *Mays v. Fifth Circuit Court of Appeals*, 755 S.W.2d 78 (Tex. 1988), wherein the Supreme Court of Texas held that "no legislative authority, state or local, can so tighten the purse strings of the judiciary's budget that it fails to provide the funds reasonably necessary for the court's efficient and effective operation." In *Vondy v. Commissioners Court of Uvalde County*, 620 S.W.2d 104, the Court held that the judicial system of this state cannot function properly if those officials who are responsible for carrying out certain duties in that process

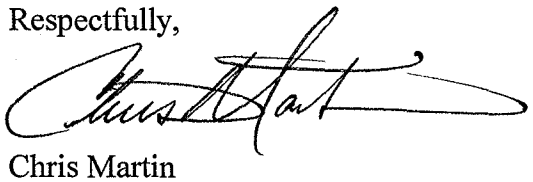
has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately. If this were not so, a legislative body could destroy the judiciary by refusing to adequately fund the court. The judiciary must have the authority to prevent any interference with or impairment of the administration of justice in this state.

Conclusion

The Commissioners and the CCL wholly disagree as to who has the final authority to set the salary of the official court reporter in the Van Zandt County Court at Law, in light of the enabling statute which provides that the official court reporter of a county court at law is entitled to receive a salary *set by the judge of the county court at law with the approval of the commissioners court*. (Texas Gov't Code § 25.2362(g)).

Furthermore, the Commissioners and CCL wholly disagree as to who has the final authority to determine if the official court reporter position will be a full-time or part-time position.

Respectfully,



Chris Martin
Criminal District Attorney

Table of Authorities

Texas Attorney General Opinions

1. Opinion No. MW-487 (1982)
2. Opinion No. JM-1083 (1989)
3. Opinion No. GA-0155 (2004)
4. Opinion No. GA-0164 (2004)
5. Opinion No. GA-0372 (2005)

Cases

1. *Mays v. Fifth Court of Appeals*, 755 S.W.2d 78 (Tex. 1988)
2. *Vondy v. Commissioners' Court of Uvalde County,* 620 S.W.2d 104 (Tex. 1981)

Statutes

1. Local Gov't. Code § 152.011, Amount of Compensation, Expenses, and Allowances Generally Applicable

2. Gov't. Code 25.2362, Van Zandt County Court at Law Provisions

Office of the Attorney General
State of Texas

July 7, 1982

Honorable James W. Smith Frio County Attorney P. O. Box V Pearsall, Texas 78061	**Opinion No. MW-487** Re: County liability for cost of reporter's shorthand notes in county court criminal trial

Dear Mr. Smith:

You advise that Frio County does not have a county court-at-law or other statutory court, and that the county court conducts criminal trials as well as civil trials. You ask if it is the responsibility of the county to pay a court reporter when one is demanded in a county court criminal trial and, if so, whether the costs thereof can be adjudged against a convicted defendant.

Article 2321, V.T.C.S., which formerly applied only to each 'district and criminal district judge' now reads:

Each judge of a court of record shall appoint an official court reporter who shall be a sworn officer of the court and shall hold office at the pleasure of the court.

County courts are courts of record. Tex. Const. art. V, s 15.

It is thus the duty of the county judge to appoint an official court reporter for the court, and it is the duty of the official reporter, when requested, to attend all sessions of court, take full shorthand notes, preserve them, and furnish transcripts of evidence and other proceedings. V.T.C.S. art. 2324. See also Tex. R. Civ. P. 376b. Although such reporters should be certified, non-certified reporters may be employed if certified reporters are not available. V.T.C.S. art. 2324b, ss 1, 14. See also V.T.C.S. art. 2326a-1 (visiting reporters, payment).

Even before article 2321 was amended to apply to all courts of record, it was mandatory that county courts appoint court reporters to report all trial proceedings in criminal trials when requested by the defendant. Code Crim.

Proc. art. 40.09, s 4. Cartwright v. State, 527 S.W.2d 535 (Tex. Crim. App. 1975). Article 40.09, section 4 of the Code of Criminal Procedure specifies:

At the request of either party the court reporter shall take shorthand notes of all trial proceedings, including voir dire examination, objections to the court's charge, and final arguments. He is not entitled to any fee in addition to his official salary for taking these notes. . . .

A similar rule applies with respect to civil cases in county courts. V.T.C.S. art. 2327. Although these statutes require the appointed shorthand reporter to take notes of proceedings only when requested to do so by a party, another statute, article 2327d, V.T.C.S., permits the county judge to have the official reporter take and preserve a record of all hearings before him.

In any case, the burden of the court reporter's official salary is to be borne by the county for which the reporter was appointed. Article 2326c, V.T.C.S., provides:

The official shorthand reporter . . . of any County Court . . . in this State, where the compensation of such reporter of such County Court . . . is not otherwise provided by special law, shall receive a salary of [not more than Two Thousand Seven Hundred Dollars ($2,700.00) per annum, nor less than Two Thousand Four Hundred Dollars ($2,400.00) per annum], such salary to be fixed and determined by the . . . County Judge . . . of the Court wherein such shorthand reporter is employed, in addition to the compensation for transcript fees as provided for by law. Said salary shall be paid monthly by the Commissioners Court of the county out of the General Fund of the county, or in the discretion of the Commissioners Court, out of the jury fund of said County. . . . (Emphasis added).

The foregoing statute no longer governs the amount of salary that may be paid the official reporter for a county court, but it still specifies the source of the salary. To the extent that article 2326c purports to prescribe the salary, it has been repealed by article 3912k, V.T.C.S. See Attorney General Opinion H-200 (1974). The latter act allows the salary to be set at no less than the appropriate salary existing on January 1, 1972, but does not specify a maximum.

In the case of most offices to which it is applicable, section 1 of article 3912k directs that the salary be set by the commissioners court, but section 4 thereof specifies:

Nothing in this Act is intended to affect the lawful procedures and delegations of authority heretofore established in any county for the purpose of setting the salary of county and precinct employees.

Inasmuch as article 2326c, V.T.C.S., had theretofore delegated to the county judge the authority to set the salary for the county court official shorthand reporter, the county judge continues to possess that power in Frio County.

There is no provision in the law for assessing the official salary of the court reporter (or the per diem and expenses of a substitute) as costs against a criminal

defendant. See Code Crim. Proc. art. 1011. See also V.T.C.S. arts. 2326a, 2326a-1, 2326c. On the other hand, a defendant requesting transcription of the reporter's shorthand notes will in most cases be required to pay therefor. Code Crim. Proc. art. 40.09, s 5. See Attorney General Opinion H-200 (1974).

We advise that it is the responsibility of Frio County to pay a court reporter when one is demanded in a county court criminal trial and that neither the costs of the reporter's official salary, nor the per diem and expenses of a substitute, can be adjudged against a convicted defendant.

SUMMARY

It is the responsibility of Frio County to pay a court reporter when one is demanded in a county court criminal trial, and neither the costs of the reporter's salary, nor the per diem and expenses of a substitute, can be adjudged against a convicted defendant.

Very truly yours,

Mark White
Attorney General of Texas

John W. Fainter, Jr.
First Assistant Attorney General

Richard E. Gray III
Executive Assistant Attorney General

Prepared by Bruce Youngblood
Assistant Attorney General

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Office of the Attorney General
State of Texas

August 8, 1989

Honorable Galen Ray Sumrow Criminal District Attorney Rockwall County Courthouse Rockwall, Texas 75087	**Opinion No. JM-1083** Re: Whether an individual may be employed as a chief deputy for a county tax assessor-collector and as an official court reporter for a county court (RQ- 1690)

Dear Mr. Sumrow:

You state that the person employed by Rockwall County as the county tax assessor-collector's chief deputy was formerly the official court reporter for the Rockwall County Court. She would like to know whether it would be legally possible for her to hold both positions.

We will first consider whether article XVI, section 40 of the Texas Constitution would prohibit one person from holding both positions. This provision states in part:

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

Tex. Const. art. XVI, s 40.

The following statute provides for the employment of a court reporter:

Each judge of a court of record shall appoint an official court reporter. An official court reporter is a sworn officer of the court and holds office at the pleasure of the court.

Gov't Code s 52.041. A county court is a court of record and is therefore subject to this provision. See Tex. Const. art. V, s 15.

A court reporter is not an officer within article XVI, section 30, of the Texas Constitution, which provides that the "duration of all offices not fixed by this

Constitution shall never exceed two years...." In Robertson v. Ellis County, 84 S.W. 1097 (Tex.Civ.App.1904, no writ), the court held that an official stenographer appointed by the district court did not hold an office within this constitutional provision. Although the statute described the position of stenographer as an office and declared that the stenographer "shall be a sworn officer of the court," it did not confer on that person any sovereign functions of the judicial department of the government. 84 S.W. at 1099.

Other Texas courts have concluded that an official court reporter is not an officer within various other provisions. See Lightfoot v. Lane, 140 S.W. 89, 90 (Tex.1911) (stenographer for Court of Civil Appeals was employee, not officer); Harris County v. Hunt, 388 S.W.2d 459, 467 (Tex.Civ.App.--Houston 1965, no writ) (court reporter was not an officer within article XVI, section 61, of the Texas Constitution requiring officers to pay fees into county treasury); Tom Green County v. Proffitt, 195 S.W.2d 845, 847 (Tex.Civ.App.-- Austin 1946, no writ) (official court reporter is not a "public officer" within article III, section 56, prohibition against local laws creating offices). Finally, this office has concluded that a court reporter is not a civil officer of emolument within article XVI, section 40, of the constitution. Attorney General Opinion O-6491 (1945). [FN1] A court reporter for a county court is not a civil officer of emolument.

A deputy appointed by a county tax assessor-collector to assist him in his duties is an employee, and not a civil officer of emolument. See Green v. Stewart, 516 S.W.2d 133 (Tex.1974); Local Gov't Code ch. 151 (appointment of employees by county officer). Accordingly, article XVI, section 40, of the Texas Constitution does not prevent one person from holding both positions.

The common law doctrine of imcompatibility does not bar one person from holding two public employments. See generally Attorney General Opinion JM-1047 (1989). The dual employment you inquire about is accordingly not prohibited by this doctrine.

You argue, based on Attorney General Opinion O-5070 (1943), that the position of an official court reporter is a full-time position, and that the judge may not appoint a part-time court reporter. Attorney General Opinion O-5070 determined that a district judge could not appoint the official court reporter to work part-time and be paid on a per diem basis. The official court reporter's yearly salary was set by statute and no statute authorized him to work part-time and receive a lesser amount.

Attorney General Opinion O-5070 is not dispositive of this matter. It relied on statutes that have since been amended or repealed. See V.T.C.S. art. 2327a (1929, repealed 1947) (setting salary of court reporter). Moreover, it dealt only with the court reporter of a district court and not the court reporter of a county court.

Section 52.046 of the Government Code, which states the powers and duties of an official court reporter, provides in part:

(a) On request, an official court reporter shall:

(1) attend all sessions of the court;

(2) take full shorthand notes of oral testimony offered before the court ...;

(3) take full shorthand notes of closing arguments if requested to do so by the attorney of a party to the case ...;

(4) preserve the notes for future reference for three years ...;

(5) furnish a transcript of the reported evidence or other proceedings....

* *

(d) A judge of a county court or county court at law shall appoint a certified shorthand reporter to report the oral testimony given in any contested probate matter in that judge's court. (Emphasis added.)

Gov't Code s 52.046.

The position of court reporter is described in terms of the duties to be performed, not of the number of hours of service required each week. The number of hours required to perform the job will depend upon the number of sessions the court reporter is requested to attend, record, and reduce to a written transcript and is likely to reflect the workload of the court with which the reporter is associated. No provision fixes a salary for a county court reporter that must be paid without regard to the amount of time required to perform the duties of the position. Instead, the commissioners court sets the salary of the court reporter in accordance with chapter 152, subchapter B of the Local Government Code, formerly article 3912k, V.T.C.S. Attorney General Opinion MW-487 (1982). The commissioners court may set a salary commensurate with the number of hours worked. See Local Gov't Code s 152.012 (salary may not be set at an amount less than the salary in effect on January 1, 1972).

We find no provision that expressly or impliedly requires the court reporter for the county court to serve as and be paid as a full-time employee, no matter how little work the job actually requires. See generally Attorney General Opinions JM-163 (1984) (secretary of Rockwall County criminal district attorney is not barred from serving from time to time as court reporter for Rockwall County Court); MW-415 (1981) (service by one person as deputy county clerk and deputy district clerk of Dallas County). Whether a person who already serves as deputy tax assessor-collector will be able to meet the work schedule of the court reporter for the county court is a fact question to be considered by the county judge in making the appointment and not a legal question to be addressed in an attorney general opinion.

You ask whether your county personnel policy will be violated if one person holds both positions. Since this question is premised on a conclusion that a county court reporter must serve as a full-time employee, we need not address

it. But see Attorney General Opinions JM-440 (1986); JM-182 (1984) (commissioners court may not set hours for employees of other county officers).

SUMMARY

Article XVI, section 40, of the Texas Constitution does not prohibit one person from serving as deputy tax assessor-collector of Rockwall County and court reporter of the Rockwall County Court. The position of official court reporter of the county court is not legally required to be a full-time position.

Very truly yours,

Jim Mattox
Attorney General of Texas

Mary Keller
First Assistant Attorney General

Lou McCreary
Executive Assistant Attorney General

Judge Zollie Steakley
Special Assistant Attorney General

Rick Gilpin
Chairman, Opinion Committee

Prepared by
Susan L. Garrison
Assistant Attorney General

Footnotes

FN1. The court in Tom Green County v. Proffitt, 195 S.W.2d 845 (Tex.Civ.App.-- Austin 1946, no writ) described Attorney General Opinion O-6491 as "a very able opinion" on the court reporter's status as an employee.

Texas OAG home page | Opinions & Open Government

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2004

The Honorable Sonya Letson Potter County Attorney 500 South Fillmore, Room 303 Amarillo, Texas 79101	Opinion No. GA-0155 Re: Whether it is a violation of article III, section 53 of the Texas Constitution for a county to pay court reporters a fee for a transcript in addition to the court reporter's salary (RQ-0101-GA)

Dear Ms. Letson:

You inform us that there are seven courts of record in Potter County, five district courts and two county courts at law.(1) *See* Tex. Gov't Code Ann. §§ 24.149, .210, .361, .428, .628 (Vernon 1988) (creating various district courts in Potter County or in Potter and additional counties), 25.1901 (Vernon Supp. 2004) (creating statutory county courts in Potter County), .1902 (jurisdiction of statutory county courts in Potter County); *see also id.* §§ 25.0003 (jurisdiction of statutory county courts generally), .0004 (powers and duties of statutory county courts). You indicate that the judge of each court has appointed a court reporter pursuant to statute and that in addition to salary, each reporter is entitled by statute to receive certain fees, including fees for the preparation of court transcripts upon request, which is a statutory duty of court reporters. *See* Request Letter, *supra* note 1, at 1-2; Tex. Gov't Code Ann. §§ 52.041, .046, .047, .051 (Vernon 1998). You state that in addition to instances in which the county pays the fee for transcripts requested by indigents, the county also pays the fee for transcripts when the county is a party to the litigation. *See* Request Letter, *supra* note 1, at 2; Tex. R. App. P. 20.1-.2 (concerning transcripts for indigents). You ask whether the county's practice of paying court reporters both a salary and a fee for the preparation of court transcripts violates article III, section 53 of the Texas Constitution, which, *inter alia*, forbids the county from paying "any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered." Tex. Const. art. III, § 53; *See* Request Letter, *supra* note 1, at 2.

I. Relevant Law

Section 52.046, Government Code, sets forth the duties and powers of a court reporter and provides:

(a) On request, an official court reporter shall:

(1) attend all sessions of the court;

(2) take full shorthand notes of oral testimony offered before the court, including objections made to the admissibility of evidence, court rulings and remarks on the objections, and exceptions to the rulings;

(3) take full shorthand notes of closing arguments if requested to do so by the attorney of a party to the case, including objections to the arguments, court rulings and remarks on the objections, and exceptions to the rulings;

(4) preserve the notes for future reference for three years from the date on which they were taken; and

(5) furnish a transcript of the reported evidence or other proceedings, in whole or in part, as provided by this chapter.

(b) An official court reporter of a district court may conduct the deposition of witnesses, receive, execute, and return commissions, and make a certificate of the proceedings in any county that is included in the judicial district of that court.

(c) The supreme court may adopt rules consistent with the relevant statutes to provide for the duties and fees of official court reporters in all civil judicial proceedings.

(d) A judge of a county court or county court at law shall appoint a certified shorthand reporter to report the oral testimony in any contested probate matter in that judge's court.

Tex. Gov't Code Ann. § 52.046 (Vernon 1998).

District court reporters are entitled by statute to be paid a salary in addition to certain fees authorized by law:

An official district court reporter shall be paid a salary set by the order of the judge of the court. This salary is in addition to transcript fees, fees for a statement of facts, and other necessary expenses authorized by law.

Id. § 52.051(a). Compensation of court reporters appointed by county court at law judges is governed by section 152.011 of the Local Government Code, which provides that "[t]he commissioners court of a county shall set the amount of the compensation, office and travel expenses, and all other allowances for county and precinct officers and employees who are paid wholly from county funds." Tex. Loc. Gov't Code Ann. § 152.011 (Vernon 1999).

In addition to receiving salaries, court reporters are also entitled to charge fees for the performance of certain tasks or duties. Section 52.047 of the Government Code, the provision you note specifically, governs the preparation of court transcripts upon request and permits the court reporter to charge a fee for such preparation:

(a) A person may apply for a transcript of the evidence in a case reported by an

official court reporter. The person must apply for the transcript in writing to the official court reporter, and the reporter shall furnish the transcript on payment of the transcript fee or as provided by Rule 40(a)(3) or 53(j),[(2)] Texas Rules of Appellate Procedure.

(b) If an objection is made to the amount of the transcript fee, the judge shall determine a reasonable fee, taking into consideration the difficulty and technicality of the material to be transcribed and any time constraints imposed by the person requesting the transcript.

(c) On payment of the fee or as provided by Rule 40(a)(3) or 53(j),[(3)] Texas Rules of Appellate Procedure, the person requesting the transcript is entitled to the original and one copy of the transcript. The person may purchase additional copies for a fee per page that does not exceed one-third of the original cost per page.

(d) An official court reporter may charge an additional fee for:

(1) postage or express charges;

(2) photostating, blueprinting, or other reproduction of exhibits;

(3) indexing; and

(4) preparation for filing and special binding of original exhibits.

(e) If an objection is made to the amount of these additional fees, the judge shall set a reasonable fee. If the person applying for the transcript is entitled to a transcript without charge under Rule 40(a)(3) or 53(j),[(4)] Texas Rules of Appellate Procedure, the court reporter may not charge any additional fees under Subsection (d).

(f) If the official court reporter charges an amount that exceeds a fee set by the judge, the reporter shall refund the excess to the person to whom it is due on demand filed with the court.

(g) Notwithstanding Rule 53(j),[(5)] Texas Rules of Appellate Procedure, an official court reporter who is required to prepare a transcript in a criminal case without charging a fee is not entitled to payment for the transcript from the state or county if the county paid a substitute court reporter to perform the official court reporter's regular duties while the transcript was being prepared. To the extent that this subsection conflicts with the Texas Rules of Appellate Procedure, this subsection controls. Notwithstanding Sections 22.004 and 22.108(b), the supreme court or the court of criminal appeals may not amend or adopt rules in conflict with this subsection.

Tex. Gov't Code Ann. § 52.047 (Vernon 1998). Additionally, court reporters are entitled to charge fees for the preparation of depositions, *see id.* § 52.059, and are entitled to reimbursement for certain expenses as well. *See id.* § 52.055.

Article III, section 53 of the Texas Constitution forbids counties or municipalities

from, *inter alia*, paying "any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered." Tex. Const. art. III, § 53.(6) The retention of fees for the performance of tasks and duties required by section 52.046 constitutes extra compensation in violation of article III, section 53 only if the court reporter's salary may be said to include payment for those tasks and duties. *See* Tex. Gov't Code Ann. § 52.046 (Vernon 1998). If the salary includes payment for the statutory tasks and duties, then sections 52.047 and 52.059, which permit a court reporter to charge a fee for preparing a transcript or deposition, would not apply to requests for transcripts and depositions requested by a county. *See id.* §§ 52.047, .059. In essence then, you ask whether the county violates article III, section 53 by paying a court reporter both a salary and a fee for preparing a transcript. *See* Request Letter, *supra* note 1, at 2.

II. Analysis

Your question is moot if court reporters may not receive fees in addition to salary. Thus, as a threshold matter, we consider whether a court reporter is a "county officer" within the meaning of Texas Constitution, article XVI, section 61, which prevents county officers from being compensated on a fee basis except as provided therein, *see* Tex. Const. art. XVI § 61, and Local Government Code chapter 154, which implements this constitutional provision. *See* Tex. Loc. Gov't Code Ann. §§ 154.002 (Vernon 1999) (salary paid in lieu of fees and commissions), .003 (collection and disposition of fees and commissions of salaried officers), .004 (state and county prohibited from paying fees or commissions to salaried officers), .005 (fees and commissions certain salaried officers may receive in addition to salary). It is evident from the original predecessor of Local Government Code chapter 154 that it was intended to implement article XVI, section 61. *See* Act of Nov. 14, 1935, 44th Leg., 2d C.S., ch. 465, § 24, 1935 Tex. Gen. Laws 1762, 1784 (the adoption of a constitutional amendment requiring county officers to be compensated solely on a salary basis creates an emergency).

Specific statutory language uses the terms "officer," "office," and "official" in describing a court reporter. *See* Tex. Gov't Code Ann. §§ 52.041 (Vernon 1998) ("official court reporter is a sworn officer of the court and holds office at the pleasure of the court"), .045 ("official court reporter must take the official oath required of officers of this state"). However, case law uniformly has held that court reporters are not "officers" for various purposes, including specifically for purposes of article XVI, section 61. *See Lightfoot v. Lane*, 140 S.W. 89, 90 (Tex. 1911) (stenographer for court of civil appeals was an employee, not an officer), *Harris County v. Hunt*, 388 S.W.2d 459, 467 (Tex. Civ. App.-Houston 1965, no writ) (court reporter was not an officer within article XVI, section 61 of the Texas Constitution requiring officers to pay fees into county treasury), *Tom Green County v. Proffitt*, 195 S.W.2d 845, 847 (Tex. Civ. App.-Austin 1946, no writ) (official court reporter is not a "public officer" within the article III, section 56 prohibition against local laws creating offices), *Robertson v. Ellis County*, 84 S.W. 1097, 1098 (Tex. Civ. App.-Dallas 1904, no writ) (court reporter is not an officer within article XVI, section 30 of the Texas Constitution, which provides that the "duration of all offices not fixed by this Constitution shall never exceed two years"); *see also* Tex. Att'y Gen. Op. Nos. JM-1083 (1989) at 2 (court reporter does not hold "civil office of emolument" for purposes of article XVI, section 40 of the constitution), O-6491 (1945) at 6.(7)

Therefore, we conclude that a court reporter is not a "district, county or precinct officer" for purposes of the prohibition on the payment of any additional fees and commissions to salaried officers that is set forth in subchapter A of chapter 154 of the Local Government Code. *See* Tex. Loc. Gov't Code Ann. § 154.002 (Vernon 1999).

Turning to your specific question, we note that article III, section 53, like its state counterpart, article III, section 44, is intended to prevent a gratuitous payment of public funds for work already performed. *See, e.g., Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928); *Dallas County v. Lively*, 167 S.W. 219, 220 (Tex. 1914); *Turner v. Barnes*, 19 S.W.2d 325, 327-28 (Tex. Civ. App.-Fort Worth 1929), *aff'd*, 27 S.W.2d 532 (Tex. Comm'n App. 1930, judgm't adopted); *Devon v. City of San Antonio*, 443 S.W.2d 598, 600 (Tex. Civ. App.-Waco 1969, writ ref'd). But payment of additional compensation for extra work performed or expenses incurred does not constitute "extra compensation" prohibited by the Texas Constitution. *See, e.g., Univ. of Tex. Sys. v. Robert E. McKee, Inc.*, 521 S.W.2d 944, 949 (Tex. Civ. App.-Eastland 1975, writ ref'd n.r.e.). In this instance, the statutory provisions at issue do not authorize payment of "extra compensation" for work already performed; rather, they authorize additional compensation for additional work requested to be performed. Indeed, the mere fact that the legislature has authorized the additional compensation for additional work performed upon request supports the proposition that the additional compensation is not intended to pay for work already performed. *See* Tex. Gov't Code Ann. §§ 52.047, .059 (Vernon 1998).

It is evident that the legislature did not intend for the term "salary," *see id.* § 52.051, or the phrase "compensation . . . and all other allowances," *see* Tex. Loc. Gov't Code Ann. § 152.011 (Vernon 1999), to include payment for the performance of other tasks for which other specific statutory provisions authorize the imposition of fees. Ordinarily, when the legislature has used a term or phrase in one section of a statute and excluded it in another, courts will not imply the term where it has been excluded. *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001); *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995); *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). In this instance, sections 52.047 and 52.059 of the Government Code expressly confer authority on court reporters to charge a fee for the performance of certain specific tasks. *See* Tex. Gov't Code Ann. §§ 52.047, .059 (Vernon 1998). By way of contrast, section 52.051 of the Government Code requires a district court reporter to be paid a "salary," *see id.* § 52.051, and section 152.011 of the Local Government Code authorizes county commissioners to set "the amount of compensation . . . and all other allowances for county and precinct officers and employees who are paid wholly from county funds." Tex. Loc. Gov't Code Ann. § 152.011 (Vernon 1999).

Moreover, this office already has noted that court reporters do not work typical eight-hour days, but rather perform specific duties in service to the courts that appointed them, *see* Tex. Att'y Gen. Op. Nos. JM-1083 (1989) at 4 ("The position of court reporter is described in terms of the duties to be performed, not of the number of hours of service required each week."), a fact which does not preclude a court reporter from being paid for any additional "outside" work. *See also* Tex. Att'y Gen. Op. No. JM-163 (1984) at 1("In essence, your secretary is being paid to perform specified duties and is not necessarily employed for a specified time during the day

during which she cannot have other employment."). Similarly, we believe that the salary authorized by sections 52.051 of the Government Code and 152.011 of the Local Government Code represents compensation for the employment duties performed in service to the court reporter's assigned court, not for the performance of any additional work performed upon request of parties in the litigation, in effect work constituting "other employment."

And finally, when the county is paying a court reporter a salary pursuant either to sections 52.051 of the Government Code or 152.011 of the Local Government Code, it is acting in the role of employer. When, by way of contrast, it is paying a court reporter for certain additional services, such as the preparation of a transcript or a deposition, it is acting in the role of a party to the litigation. No provision in the Government Code nor the Local Government Code supports the proposition that the legislature intended that counties, when requesting transcripts in the role of parties to litigation, should be treated differently than other nongovernmental parties requesting transcripts. In such an instance, the additional compensation received by the court reporter is not "extra compensation" for services or work already performed in the role as an employee of the county; rather, it is additional work performed at the request of a litigating party.

SUMMARY

Sections 52.051 of the Government Code and 152.011 of the Local Government Code authorize a district court reporter and a county court at law court reporter, respectively, to be paid a salary. Additional fees charged under sections 52.047 and 52.059 of the Government Code do not constitute extra compensation in violation of article III, section 53 of the Texas Constitution. A county may be required to pay for a transcript prepared by a court reporter when the county itself is a party to litigation or when the transcript is prepared for an indigent pursuant to the Texas Rules of Appellate Procedure.

Very truly yours,

GREG ABBOTT
Attorney General of Texas

BARRY MCBEE
First Assistant Attorney General

DON R. WILLETT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

Jim Moellinger
Assistant Attorney General, Opinion Committee

Footnotes

1. *See* Letter from Honorable Sonya Letson, Potter County Attorney, to Honorable Greg Abbott, Texas Attorney General, at 1 (Aug. 29, 2003) (on file with Opinion Committee) [hereinafter Request Letter].

2. Rule 40(a)(3) of the Texas Rules of Appellate Procedure, adopted in 1986, was amended in 1997 and is now Rule 20.1; Rule 53(j), also adopted in 1986, was amended in 1997 and is now Rule 20.2. *See* Tex. R. App. P. 20.1-.2; Tex. Gov't Code Ann. §§ 22.004, .108 (Vernon 2004) (authority of Texas Supreme Court and Texas Court of Criminal Appeals to adopt rules of appellate procedure).

3. *See supra* note 2.

4. *See supra* note 2.

5. *See supra* note 2.

6. Article III, section 44 of the Texas Constitution, which is considered the state counterpart to section 53, provides:

The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law.

Tex. Const. art. III, § 44.

7. *But see In re Johnson*, 554 S.W.2d 775, 784 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.) (holding that a court reporter is an "officer" for purposes of article III, section 44 of the Texas Constitution, which authorizes the legislature to provide by law for the compensation of all officers, servants, agents, and public contractors, not provided for in this Constitution). Because a court could hold that court reporters fall within the scope of article III, section 44 because they are "servants" or "agents" without holding that they are "officers" and because the case on appeal to the Texas Supreme Court was decided because the appellant failed to preserve any point of error, *see In re Johnson*, 569 S.W.2d 882 (Tex. 1978), we are reluctant to conclude that court reporters are "officers" as opposed to "employees."

Home | Opinions

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2004

Ms. Alicia G. Key Administrative Director Office of Court Administration 205 West 14th Street, Suite 600 Austin, Texas 78711-2066	Opinion No. GA-0164 Re: Whether court reporters who are full-time state employees may receive a fee for a transcript in addition to the court reporter's salary (RQ-0111-GA)

Dear Ms. Key:

You ask four questions regarding whether court reporters appointed pursuant to chapter 201 of the Family Code and who are full-time state employees may charge and retain fees for preparing transcripts.(1)

I. Background

You inform us that, pursuant to section 201.207 of the Family Code, the Office of Court Administration ("OCA") currently employs six court reporters who serve as court reporters for hearings conducted by associate judges for child protection cases pursuant to authority conferred by subchapter C of chapter 201 of the Family Code. *See* Request Letter, *supra* note 1, at 1. The court reporters are employed pursuant to the OCA's authority "to implement and administer this subchapter" and are considered to be state employees "for all purposes, including accrual of leave time, insurance benefits, and travel regulations." Tex. Fam. Code Ann. § 201.207(a) (Vernon 2002). The court reporters, who are classified as "hearings reporters"(2) under the state classification system, take verbatim shorthand notes of testimony and statements made at hearings and trials of cases referred to associate judges by judges of courts of record. *See* Request Letter, *supra* note 1, at 1. Essentially, you wish to know whether the court reporters may, or must, charge and retain fees for preparing transcripts or, if they may not, whether the OCA may charge and retain such fees.

II. Relevant Law

In 1999, in response to what was perceived to be "an already overburdened court system," the legislature enacted Senate Bill 1735 ("S.B. 1735"), which, *inter alia*, authorized the appointment of associate judges by the presiding judge for each administrative judicial region for the more speedy and efficient adjudication of child protection cases. Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1735, 76th Leg., R.S. (1999) at 1; *see* Act of May 17, 1999, 76th Leg., R.S., ch. 1302, § 12, 1999 Tex. Gen. Laws 4448, 4451-52 (codified at Tex. Fam. Code Ann.

§ 201.201 (Vernon Supp. 2004)). The bill added subchapter C to chapter 201 of the Family Code, which at subchapter A authorizes the appointment of associate judges by a judge of a court of record having jurisdiction of a suit under titles 1, 4, or 5 of the Family Code. These titles govern the marriage relationship, protective orders and family violence, and the parent-child relationship, respectively. *See* Tex. Fam. Code Ann. § 201.001 (Vernon Supp. 2004). Additionally, subchapter B of chapter 201 authorizes the presiding judge of each administrative judicial region to appoint associate judges for the enforcement and collection of overdue child support. *See id.* § 201.101.

Chapter 201 does not create or authorize the creation of new or additional courts. Rather, it authorizes presiding judges to appoint associate judges, to whom judges of already-existing courts having jurisdiction over family law cases, including child protection cases, may refer any aspect of such cases. *See id.* § 201.005 (Vernon 2002). Associate judges under chapter 201 serve essentially as adjuncts to the referring courts and have broad authority regarding the conduct of a hearing, including making findings of fact on evidence, formulating conclusions of law, and recommending an order to be rendered in the case. *See id.* § 201.007 (Vernon Supp. 2004); *see also id.* §§ 201.204 (general powers of associate judge under subchapter C), .202 (Vernon 2002) (providing that subchapter A applies to associate judges under subchapter C unless otherwise provided by subchapter C). A recommendation of an associate judge under subchapter C becomes an order of the referring court by operation of law without ratification of the referring court unless the recommendation is appealed. *See id.* § 201.2041 (Vernon Supp. 2004); *see also id.* §§ 201.2042 (providing that section 201.015, which governs appeals of recommendations by associate judges to the judge's referring court, applies to appeals to referring judges under subchapter C), .015 (Vernon 2002) (providing for appeal of the associate judge's recommendation to the referring court).

Under subchapter C, the presiding judge of an administrative judicial region may appoint personnel as needed "to implement and administer the provisions of this subchapter," and the salaries of such personnel shall be paid from county funds or "from funds available from the state and federal governments as provided by this subchapter." *Id.* § 201.206(a)-(b). Section 201.009 expressly provides that in some circumstances a court reporter "may be provided" either by the associate judge, the referring judge, or a party and "is required to be provided" in others:

(a) A court reporter may be provided during a hearing held by an associate judge appointed under this chapter. A court reporter is required to be provided when the associate judge presides over a jury trial or a final termination hearing.

(b) A party, the associate judge, or the referring court may provide for a reporter during the hearing, if one is not otherwise provided.

(c) The record may be preserved in the absence of a court reporter by any other means approved by the associate judge.

(d) The referring court or associate judge may tax the expense of preserving the record under Subsection (c) as costs.

(e) On appeal of the associate judge's report or proposed order, the referring court may consider testimony or other evidence in the record, if the record is taken by a court reporter, in addition to witnesses or other matters presented under Section 201.015.

Id. § 201.009.(3)

III. Analysis

A. Authority of a Court Reporter who is a Full-time State Employee to Impose a Fee for Preparing a Requested Transcript

You first ask whether a court reporter serving an associate judge under subchapter C of chapter 201 of the Family Code may impose a fee for preparing a transcript. In describing the status of the court reporters at issue, your request letter states:

These court reporters are not official court reporters because they are not appointed under Section 52.041 of the Government Code. We question, however, whether the nature of their duties and the circumstances of their appointments would require them to charge a fee under the provisions of Rule 35.3 and Section 52.047.

Request Letter, *supra* note 1, at 2.

Section 52.041 of the Government Code requires the judges of all courts of record to appoint official court reporters. *See* Tex. Gov't Code Ann. § 52.041 (Vernon 1998). The official or deputy court reporter "is responsible for preparing, certifying, and timely filing the reporter's record if

. . . a notice of appeal has been filed; . . . the appellant has requested that the reporter's record be prepared; and . . . the party responsible for paying for the preparation of the reporter's record has paid the reporter's fee, or has made satisfactory arrangements with the reporter to pay the fee, or is entitled to appeal without paying the fee." Tex. R. App. P. 35.3(b). An official court reporter is permitted to charge a fee for preparing a requested transcript. *See* Tex. Gov't Code Ann. § 52.047 (Vernon 1998). Thus, if court reporters appointed pursuant to section 201.206 of the Family Code, who are required or provided for a hearing pursuant to section 201.009 of the code, are "official court reporters," then they may charge the fee authorized by section 52.047 of the Government Code. *See* Tex. Fam. Code Ann. §§ 201.009 (Vernon 2002), .206 (Vernon Supp. 2004); Tex. Gov't Code Ann. § 52.047 (Vernon 1998). Your first question presupposes that the court reporters at issue are not official court reporters because they are not appointed pursuant to section 52.041 of the Government Code. We disagree with your assumption because we believe that the court reporters serving under subchapter C of chapter 201 of the Family Code are official court reporters.

Court reporters and shorthand reporting firms are governed by chapter 52 of the Government Code. "Official court reporter" is defined by that chapter to mean "the shorthand reporter appointed by a judge as the official court reporter." Tex. Gov't Code Ann. § 52.001(3) (Vernon Supp. 2004). While it is correct that the court reporters at issue are not appointed under section 52.041 of the Government Code,

they are appointed instead by presiding judges of the administrative regions under section 201.206 of the Family Code and, of course, serve at the pleasure of the officer appointing them. *See* Tex. Fam. Code Ann. § 201.206 (Vernon Supp. 2004). Thus, because they are appointed by a judge under section 201.206 of the Family Code, court reporters serving under subchapter C of chapter 201 of the Family Code are "official court reporters" for purposes of chapter 52 of the Government Code. Section 52.047 of the Government Code permits all official court reporters, not only court reporters appointed pursuant to section 52.041, to charge a fee for preparing requested transcripts; therefore, court reporters appointed under section 201.206 of the Family Code may charge such fees also. Neither the fact that associate judges whom the court reporters serve act not as judges of their own separate courts but rather as associate judges of already-existing courts, nor the fact that the associate judges and the court reporters are considered to be "state employees for all purposes" are of any moment. *See* Tex. Fam. Code Ann. § 201.207(a) (Vernon 2002).

Therefore, we conclude that court reporters appointed pursuant to section 201.206 of the Family Code, who are required or provided for a hearing pursuant to section 201.009 of the code, are "official court reporters" for purposes of section 52.001(3) of the Government Code and, therefore, may charge a fee for preparing a transcript pursuant to section 52.047 of the Government Code. We note that your first question is whether court reporters are "required" to charge fees for preparing transcripts. *See* Request Letter, *supra* note 1, at 2. Neither section 52.047 of the Government Code nor Rule of Appellate Procedure 35.3 requires the imposition of a fee; those provisions require payment of any fee imposed, except as specifically provided. *See* Tex. Gov't Code Ann. § 52.047 (Vernon 1998); Tex. R. App. P. 35.3 (b).

B. Authority of a Court Reporter who is a Full-time State Employee to Retain a Transcript Fee for Preparing a Transcript

Your second question is: "May a court reporter who is a full-time state employee receive a fee for the preparation of a transcript if the reporter prepares the transcript on her own time by either doing so after business hours or taking annual leave?" *See* Request Letter, *supra* note 1, at 3. Your concern is prompted by the fact that section 201.207 of the Family Code expressly makes associate judges and all additional personnel appointed under subchapter C "state employees for all purposes, including accrual of leave time, insurance benefits, and travel regulations." Tex. Fam. Code Ann. § 201.207(a) (Vernon 2002). At the same time, section 659.020 of the Government Code imposes limitations on compensation for state employees, specifically proscribing all salary supplements unless otherwise authorized by law. That section provides:

A state employee employed by a state agency as defined by Section 658.001 whose position is classified under Chapter 654 or whose exempt position is funded by the General Appropriations Act may not receive a salary supplement from any source unless a specific grant of authority to do so is provided by the General Appropriations Act or other law.

Tex. Gov't Code Ann. § 659.020 (Vernon Supp. 2004). In your request letter you

state:

Because there is no grant of authority in the General Appropriations Act for them to do so, the OCA court reporters are prohibited by this statute from receiving a salary supplement. If the fee charged by a court reporter for preparation of a transcript is a "salary supplement," then OCA's court reporters are prohibited from receiving such a fee.

Request Letter, *supra* note 1, at 3.

The compensation scheme for official district court reporters contemplates a bifurcated arrangement in which district court reporters are entitled by statute to be paid a salary in addition to certain fees for the performance of specified additional responsibilities. *See* Tex. Gov't Code Ann. §§ 52.051(a) (Vernon 1998) (court reporters entitled to payment of salary in addition to certain fees), .047 (court reporters authorized to impose fees for preparing requested transcripts), .059 (court reporters authorized to impose fees for the taking of depositions). It is evident that the legislature did not intend for the term "salary," *see id.* § 52.051, to include payment for the performance of other tasks for which other specific statutory provisions authorize the imposition of fees. Analogously, under subchapter C of chapter 201 of the Family Code, the salaries of personnel appointed by the presiding judge of an administrative judicial region are to be "paid from county funds available for payment of officers' salaries subject to the approval of the commissioners court or from funds available from the state and federal governments." Tex. Fam. Code Ann. § 201.206(b) (Vernon Supp. 2004). In addition, court reporters serving under subchapter C of chapter 201, like all court reporters, are authorized to impose fees for the performance of additional tasks or duties. *See* Tex. Gov't Code Ann. §§ 52.047, .059 (Vernon 1998). Under neither chapter 52 of the Government Code nor chapter 201 of the Family Code did the legislature intend for the retention of fees whose imposition expressly is authorized by law to constitute "salary." Therefore, we conclude that retention of the authorized fees by the court reporters serving under subchapter C of chapter 201 of the Family Code does not constitute a "salary supplement" for purposes of section 659.020 of the Government Code.

We also note that, even if we were to consider such fees to be "salary supplements" under section 659.020 of the Government Code, section 52.047 of that code is itself "other law" that furnishes sufficient authority for the retention of fees. *See id.* §§ 52.047 (Vernon 1998), 659.020 (Vernon Supp. 2004). Section 52.047 provides that a person may apply for a transcript in a case reported by an official court reporter "and the reporter shall furnish the transcript *on payment of the transcript fee* or as provided by Rules 40(a)(3) or 53(j),[(4)] Texas Rules of Appellate Procedure." *Id.* § 52.047(a) (emphasis added). The person requesting the transcript may object to the fee imposed by the court reporter; in that event, the judge determines a reasonable fee. *See id.* § 52.047(b). On payment of the transcript fee, the person requesting the transcript is entitled to the original and one copy of the transcript. *See id.* § 52.047(c). The court reporter "may charge an additional fee for: (1) postage or express charges; (2) photostating, blueprinting, or other reproduction of exhibits; (3) indexing; and (4) preparation for filing and special binding of original exhibits." *Id.* § 52.047(d). Again, the person requesting the transcript may object to

the additional fees charged; in that event the judge determines a reasonable fee. *See id.* § 52.047(e). And finally, "[i]f the official court reporter *charges* an amount that exceeds a fee set by the judge, the reporter *shall refund the excess* to the person to whom it is due on demand filed with the court." *Id.* § 52.047(f) (emphasis added). If it is not clear from a reading of section 52.047 of the Government Code that the section authorizes a court reporter imposing the fee to also retain that fee, it is clear from a reading of cases that construe that section. *See, e.g.*, *Holloway v. Butler*, 828 S.W.2d 810 (Tex. App.-Houston [1st Dist.] 1992, writ denied); *Hatch v. Davis*, 621 S.W.2d 443 (Tex. Civ. App.-Corpus Christi 1981, writ ref'd n.r.e.); *In re Johnson*, 554 S.W.2d 775 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Therefore, official court reporters serving under subchapter C of chapter 201 of the Family Code may retain fees imposed pursuant to section 52.047 of the Government Code, without thereby violating the statutory proscription against salary supplementation set out in section 659.020 of the Government Code.

C. Preparation of Transcripts by Court Reporters During a Normal Business Day

As we have noted, a court reporter who is serving an associate judge under subchapter C of chapter 201 of the Family Code is an "official court reporter" for purposes of section 52.047 of the Government Code and may therefore charge and retain a fee for preparing requested transcripts. Unlike official court reporters serving state district courts who are considered employees of the district or county in which they are employed, *see* Tex. Gov't Code Ann. § 52.051 (Vernon 1998), official court reporters serving under subchapter C of chapter 201 of the Family Code are state employees "for all purposes, including accrual of leave time, insurance benefits, retirement benefits, and travel regulations." Tex. Fam. Code Ann. § 201.207(a) (Vernon 2002). Because full-time state employees are required to work 40-hour weeks, *see* Tex. Gov't Code Ann. §§ 658.001(a) (Vernon Supp. 2004) (defining "full-time employee" of state as one who is required to work 40-hour weeks, except as provided); .002 (Vernon 1994) (providing salaried full-time state employees are required to work 40-hour weeks), your third question is whether court reporters serving under subchapter C of chapter 201 of the Family Code must prepare requested transcripts on their own time by doing so either "after normal business hours or by taking annual leave," or whether they may be prepared during normal business hours. *See* Request Letter, *supra* note 1, at 3.

Your question presupposes that the preparation of transcripts by official court reporters does not involve responsibilities imposed by statute; rather, you consider such preparation akin to outside employment in which an employee engages only on his own time, and not during regular business hours. Presumably, you make this assumption because preparing transcripts occurs only upon request of a private person, typically a party to the litigation who also pays for such preparation. However, preparing transcripts upon request expressly is one of the statutory responsibilities of official court reporters, *see* Tex. Gov't Code Ann. § 52.047 (Vernon 1998), whose performance may be compelled by writ of mandamus, *see, e.g.*, *Wolters v. Wright*, 623 S.W.2d 301 (Tex. 1981); *O'Neal v. Stovall*, 580 S.W.2d 130 (Tex. Civ. App.-Austin 1979, no writ); *City of Ingleside v. Johnson*, 537 S.W.2d 145 (Tex. Civ. App.-Corpus Christi 1976, no writ), even in instances in which the

court reporter has since resigned or is no longer employed by the court. *See, e.g.*, *Boykin v. Sala*, 636 S.W.2d 590 (Tex. App.-San Antonio 1982, no writ); *Loflin v. Weiss*, 605 S.W.2d 377 (Tex. Civ. App.-Amarillo 1980, no writ). Therefore, we conclude that court reporters may perform, and indeed should perform during normal business hours those tasks or responsibilities imposed upon them by statute, including preparing requested transcripts.

We note that, typically, court reporters serve the judges who appoint them, rather than work traditional 40-hour-per-week jobs; their jobs are described in terms of the tasks or duties to be performed, not the number of required hours. *See* Tex. Att'y Gen. Op. No. JM-1083 (1989) at 4. Trial court judges are required to "ensure that the court reporter's work is timely accomplished by setting work priorities," with the "reporter's duties relating to proceedings before the court tak[ing] preference over other work." Tex. R. App. P. 13.3 (priorities of reporters); *see also Wolters*, 623 S.W.2d at 304 n.3; Tex. R. App. P. 13.4 (report of reporter's workload provided to judge). Thus, in any specific instance, the work priorities undertaken by a court reporter at the direction of an overseeing judge are matters of the judge's discretion.

Because of our answers to your previous questions, we need not answer your fourth question.

SUMMARY

A court reporter serving under subchapter C of chapter 201 of the Family Code is an "official court reporter" for purposes of section 52.047 of the Government Code and may therefore charge a fee for preparing transcripts. Because such fees are not considered to be salary supplements, retention of such fees is not a violation of section 659.020 of the Government Code, which prohibits a state employee from receiving a salary supplement. Because preparing requested transcripts is a responsibility of official court reporters imposed by statute, a court reporter serving under subchapter C of chapter 201 of the Family Code may prepare such transcripts during normal business hours, rather than be required to prepare such transcripts after normal business hours or by taking annual leave.

Very truly yours,

GREG ABBOTT
Attorney General of Texas

BARRY MCBEE
First Assistant Attorney General

DON R. WILLETT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

Jim Moellinger
Assistant Attorney General, Opinion Committee

Footnotes

1. *See* Letter from Alicia G. Key, Administrative Director, Office of Court Administration, to Honorable Greg Abbott, Texas Attorney General (Sept. 24, 2003) (on file with Opinion Committee) [hereinafter Request Letter].

2. *See* General Appropriations Act, 78th Leg., R.S., ch. 1330, art. IX, IX-10, 2003 Tex. Gen. Laws 5023, 5879.

3. For two reasons we believe that section 201.009 applies to subchapter C. First, section 201.202 of the code provides that "[e]xcept as provided by this subchapter, Subchapter A applies to an associate judge appointed under this subchapter." Tex. Fam. Code Ann. § 201.202(a) (Vernon 2002). The only sections expressly falling within that exception are sections 201.001, 201.003, and 201.004. *See id.* §§ 201.001(e), .003(d), .004(d) (Vernon Supp. 2004) (each section providing that "[t]his section does not apply to an associate judge appointed under Subchapter B or C" (footnotes omitted)). Thus, section 201.009 applies to subchapter C. Second, prior to its amendment by S.B. 1735, the principal purpose of which was to add subchapter C to chapter 201, section 201.009 did not require the court reporter's presence during hearings then governed by that chapter. *See* Act of Apr. 6, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 240, *amended by* Act of May 17, 1999, 76th Leg., R.S., ch. 1302, § 6, 1999 Tex. Gen. Laws 4448, 4449. S.B. 1735 amended section 201.009 to provide that court reporters may be provided in some instances and must be provided in others, including instances in which an associate judge presides over a jury trial or a final termination hearing. *See* Act of May 17, 1999, 76th Leg., R.S., ch. 1302, § 6, 1999 Tex. Gen. Laws 4448, 4449. Thus, but for the addition of subchapter C and the evident intent of the legislature that section 201.009 of the code apply to subchapter C, section 201.009 would not have needed to be amended.

4. Rule 40(a)(3) of the Texas Rules of Appellate Procedure, adopted in 1986, was amended in 1997 and is now Rule 20.1. Rule 53(j), also adopted in 1986, was amended in 1997 and is now Rule 20.2. *See* Tex. R. App. P. 20.1-.2; Tex. Gov't Code Ann. §§ 22.004, .108 (Vernon Supp. 2004) (authority of Texas Supreme Court and Texas Court of Criminal Appeals to adopt rules of appellate procedure).

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2005

The Honorable Robert F. Vititow Rains County Attorney 220 West Quitman Post Office Box 1075 Emory, Texas 75440	Opinion No. GA-0372 Re: Whether a county clerk may collect a court reporter service fee under section 51.601 of the Government Code if the county court has not appointed an official court reporter (RQ-0343-GA)

Dear Mr. Vititow:

You ask whether a county clerk may collect a court reporter service fee under section 51.601 of the Government Code if the county court has not appointed an official court reporter. (1)

Section 51.601 of the Government Code authorizes a court clerk to collect a court reporter service fee in certain circumstances:

> (a) *The clerk of each court that has an official court reporter shall collect a court reporter service fee* of $15 as a court cost in each civil case filed with the clerk to maintain a court reporter who is available for assignment in the court.
>
> (b) The clerk shall collect this fee in the manner provided for other court costs and shall deliver the fee to the county treasurer, or the person who performs the duties of the county treasurer, of the county in which the court sits. The county treasurer, or the person who performs the duties of the county treasurer, shall deposit the fees received into the court reporter service fund.
>
> (c) The commissioners court of the county shall administer the court reporter service fund to assist in the payment of court-reporter-related services, that may include maintaining an adequate number of court reporters to provide services to the courts,
>
> obtaining court reporter transcription services, closed-caption transcription machines, Braille transcription services, or other transcription services to comply with state or federal laws, or providing any other service related to the functions of a court reporter.
>
> (d) The commissioners court shall, in administering the court reporter service fund, assist any court in which a case is filed that requires the payment of the court reporter service fee.

Tex. Gov't Code Ann. § 51.601(a)-(d) (Vernon 2005) (emphasis added).

As background to your question, you explain that the county court in your county uses a court reporter only when requested by the parties. *See* Request Letter, *supra* note 1, at 1. The county court has "neither a full-time or part-time reporter nor a contract with any specific reporter to use only that reporter's service." *Id.* The court "contract[s] with various court reporters on an independent contractors basis as the need arises." *Id.*

Given these facts, you ask two questions about section 51.601 of the Government Code:

> Can a county clerk collect a fee pursuant to Sec. 51.601 of the Texas Government Code when the county court has neither a full-time court reporter nor a contract with a court reporter to exclusively use that reporter's service?
>
> Is a court considered to have an official court reporter for purposes of Sec. 51.601 of the Texas Government Code when the court does not have a full-time court reporter but

instead secures the services of various court reporters as independent contractors when needed?

Id.

Your second question asks about the meaning of the statutory term "official court reporter." *See id.* Because the meaning of the term is essential to answering your first question, we address your second question first.

In construing section 51.601, we must give effect to the legislature's intent. *See* Tex. Gov't Code Ann. §§ 311.021, .023 (Vernon 2005); *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997). To do so, we must construe it according to its plain language. *See In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607-08 (Tex. 1985); *see also* Tex. Gov't Code Ann. § 311.011(a) (Vernon 2005) (words and phrases to be read in context). "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Tex. Gov't Code Ann. § 311.011(b) (Vernon 2005).

Section 51.601(a) requires "[t]he clerk of each court *that has an official court reporter*" to collect the $15.00 court reporter service fee. *Id.* § 51.601(a) (emphasis added). Chapters 51 through 57 of the Government Code govern judicial branch personnel. Chapter 51 of the Government Code, which governs court clerks, does not define the term "official court reporter." However, chapter 52, which generally governs court reporters, does define the term. In chapter 52, the term "official court reporter" means "the shorthand reporter appointed by a judge as the official court reporter." *Id.* § 52.001(3). [(2)] We further note that section 52.041 of the Government Code provides that "[e]ach judge of a court of record shall appoint an official court reporter. An official court reporter is a sworn officer of the court and holds office at the pleasure of the court." *Id.* § 52.041.

We believe it is clear from chapter 52 that the term "official court reporter" is a term of art that refers to a court reporter who has been appointed by a judge as the official court reporter for the court. *See id.* §§ 52.001(3), .041; *see also* Tex. Att'y Gen. Op. Nos. GA-0164 (2004) at 4 (concluding that a court reporter appointed by a court under the Family Code is an official court reporter), M-1095 (1972) at 6 (distinguishing between a reporter "taking the notes on a 'per case' basis" and an official court reporter appointed "as part of the personnel of the court"). Thus, in answer to your second question, a court that "secures the services of various court reporters as independent contractors when needed" and has not appointed an official court reporter would not be "considered to have an official court reporter for purposes of" section 51.601. Request Letter, *supra* note 1, at 1.

Your first question is whether "a county clerk [may] collect a fee pursuant to [section 51.601] when the county court has neither a full-time court reporter nor a contract with a court reporter to exclusively use that reporter's service." *Id.* By its plain terms, section 51.601(a) provides for the collection of the court reporter service fee only by the clerk of a court with an official court reporter. *See* Tex. Gov't Code Ann. § 51.601(a) (Vernon 2005) ("*The clerk of each court that has an official court reporter shall collect a court reporter service fee* of $15 as a court cost in each civil case filed with the clerk to maintain a court reporter who is available for assignment in the court.") (emphasis added). Section 51.601 does not authorize a clerk of a court that does not have an official court reporter to collect the court reporter service fee.

Finally, we note that a county court is a court of record, *see* Tex. Const. art. V, § 15, and therefore required by section 52.041 to appoint an official court reporter, *see* Tex. Gov't Code Ann. § 52.041 (Vernon 2005). [(3)] However, there is no requirement that the position of official court reporter of the county court must be a full-time position. *See* Tex. Att'y Gen. Op. No. JM-1083 (1989) at 3-4; [(4)] *see also* Tex. Att'y Gen. Op. Nos. GA-0164 (2004) at 7 (noting that "typically, court reporters serve the judges who appoint them, rather than work traditional 40-hour-per-week jobs; their jobs are described in terms of the tasks or duties to be performed, not the number of required hours") (citing Attorney General Opinion JM-1083), GA-0155 (2004) at 6 (same). As a result, the county court could appoint as its official court reporter a person who is paid by the county on a part-time basis. If the court does so, the clerk of the court would be authorized to collect the court reporter service fee.

SUMMARY

A county clerk may not collect a court reporter service fee under section 51.601 of the Government Code if the county court has not appointed an official court reporter.

Very truly yours,

GREG ABBOTT
Attorney General of Texas

BARRY MCBEE
First Assistant Attorney General

NANCY S. FULLER
Chair, Opinion Committee

Mary R. Crouter
Assistant Attorney General, Opinion Committee

Footnotes

1. *See* Letter from Honorable Robert F. Vititow, Rains County Attorney, to Honorable Greg Abbott, Texas Attorney General, at 1 (May 3, 2005) (on file with Opinion Committee, *also available at* http://www.oag.state.tx.us) [hereinafter Request Letter].

2. *See also* Tex. Gov't Code Ann. § 52.001(4) (Vernon 2005) ("Shorthand reporter" and "court reporter" mean "a person who engages in shorthand reporting."), (5) ("Shorthand reporting" and "court reporting" mean "the practice of shorthand reporting for use in litigation in the courts of this state by making a verbatim record of an oral court proceeding, deposition, or proceeding before a grand jury, referee, or court commissioner using written symbols in shorthand, machine shorthand, or oral stenography.").

3. Unlike your county court, some courts are excepted from this general requirement by a special statute. *See, e.g., id.* §§ 25.0042(h) (Vernon 2004) ("The judge of [an Anderson County] court at law may appoint an official court reporter or the judge may contract for the services of a court reporter under guidelines established by the commissioners court."), 25.0392(h) ("The judge of a [Cherokee County] court at law may appoint an official court reporter or the judge may contract for the services of a court reporter under guidelines established by the commissioners court."), 25.1412(g) ("The judge of a [Lamar County] court at law may appoint an official court reporter or the judge may contract for the services of a court reporter."); *see also* Tex. Att'y Gen. Op. No. M-1095 (1972) at 5 (addressing a statute permitting but not requiring a court to appoint an official court reporter).

4. As this office stated in Attorney General Opinion JM-1083, The position of court reporter is described in terms of the duties to be performed, not of the number of hours of service required each week. The number of hours required to perform the job will depend upon the number of sessions the court reporter is requested to attend, record, and reduce to a written transcript and is likely to reflect the workload of the court with which the reporter is associated. No provision fixes a salary for a county court reporter that must be paid without regard to the amount of time required to perform the duties of the position. Instead, the commissioners court sets the salary of the court reporter in accordance with chapter 152, subchapter B of the Local Government Code . . . . The commissioners court may set a salary commensurate with the number of hours worked.

Tex. Att'y Gen. Op. No. JM-1083 (1989) at 4.

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755 S.W.2d 78
(Cite as: 755 S.W.2d 78)

H

Supreme Court of Texas.
The Honorable Richard MAYS, Judge, et al., Relators,
v.
The FIFTH COURT OF APPEALS, Respondent.

No. C–7342.
June 22, 1988.
Rehearing Denied Sept. 14, 1988.

County, its Commissioners Court, and individual commissioners sought writ of mandamus against district court to set aside court orders directing commissioners to show cause why they should not be held in contempt for failing to vote salary increases for court reporters, as set by district court orders. The Dallas Court of Appeals, Fifth Supreme Judicial District, 747 S.W.2d 842, conditionally granted petition and denied it in part. The Supreme Court, Ray, J., held that Commissioners Court acted in violation of statute governing court reporter pay increases in not setting salaries prescribed by district judges.

Ordered accordingly.

Spears, J., filed a concurring opinion in which Wallace, Robertson, Kilgarlin and Mauzy, JJ., joined.

West Headnotes

[1] Courts 106 ⚿57(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(B) Court Officers
106k57 Stenographers
106k57(2) k. Compensation and Fees. Most Cited Cases

A 5% court reporter pay increase, which was ordered by district judges and which was less than 10% increase authorized by statute, was a ministerial act to be performed by Commissioners Court and an act in which Legislature left no discretion, and Commissioners Court acted in violation of statute in not setting salaries prescribed by district judges. V.T.C.A., Government Code § 52.051.

[2] Mandamus 250 ⚿157

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k157 k. Notice or Rule to Show Cause. Most Cited Cases

Mandamus 250 ⚿173

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k173 k. Conduct of Hearing or Trial. Most Cited Cases

Performance of clear statutory duty which is ministerial and nondiscretionary may be directed by district court without notice and hearing in the absence of statutory requirement to the contrary.

[3] Courts 106 ⚿57(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(B) Court Officers
106k57 Stenographers
106k57(2) k. Compensation and Fees. Most Cited Cases

Statute governing pay increases for court reporters did not require district judges to provide notice and hearing prior to instituting pay increase. V.T.C.A., Government Code § 52.051.

[4] Courts 106 ⚿57(2)

106 Courts
106II Establishment, Organization, and Procedure
106II(B) Court Officers

106k57 Stenographers
106k57(2) k. Compensation and Fees. Most Cited Cases

By virtue of express constitutional and statutory authority, district judges' actions in ordering court reporter pay increases had presumption of validity and was subject to be abrogated by Commissioners Court only upon proof that judiciary's actions were extravagant, arbitrary, or unwarranted. V.T.C.A., Government Code § 52.051; Vernon's Ann.Texas Const. Art. 3, § 44.

***78** Kerry W. Young, Dallas County Criminal Dist. Courts, Dallas, for relators.

Earl Luna and Mary Milford, Law Offices of Earl Luna, Dallas, for respondent.

OPINION

RAY, Justice.

This case, involving a salary increase for court reporters, is governed by TEX.GOV'T CODE ANN. § 52.051 (Vernon 1988). Some of the District Judges of Dallas County ordered a 5% salary increase for their court reporters pursuant to that statutory authority. However, the Dallas County Commissioners Court passed an order instituting only a 3% pay increase for the court reporters, but ordered an additional 2% increase to be paid effective October 1, 1987, if a court should determine ***79** that § 52.051 is constitutional. The Commissioners Court then filed in the district court a petition for declaratory judgment asserting that § 52.051 unconstitutionally circumscribes the authority of the Commissioners Court to set the tax rate for the county. *See* TEX.CONST. art. VIII, §§ 1–A, 9.

When the Commissioners Court refused to fund the 5% raise, the Judges ordered them to direct the County Treasurer to issue payroll checks to the court reporters reflecting the 5% salary increase. ("The October orders"). The Commissioners Court did not comply and the Judges issued show cause orders. The Commissioners Court then filed for mandamus relief with the Dallas Court of Appeals which found that: (1) the orders actually direct action and, therefore, were essentially writs of mandamus orders made without notice and hearing to the Commissioners Court; (2) the Judges contravened TEX.R.CIV.P. 694 because a mandamus cannot issue ex parte; (3) the Commissioners Court was entitled to notice and a hearing on the October orders; and (4) it appeared at oral argument that the Judges would not vacate the orders on motion as required by TEX.R.CIV.P. 694. Accordingly, the court of appeals ordered the Judges to vacate their October orders. 747 S.W.2d 842, 847 (1988).

This case is controlled by TEX.GOV'T CODE ANN. § 52.051 (Vernon 1988) which provides:

> (a) An official district court reporter shall be paid a salary set by the order of the judge of the court. This salary is in addition to transcript fees, fees for a statement of facts, and other necessary expenses authorized by law.
>
> (c) An order increasing the salary of an official district court reporter must be submitted to the commissioners court of each county in the judicial district not later than September 1 immediately before the adoption of the county budget for the next year. A commissioners court may allow an extension of this time limit.

The District Judges complied with § 52.051(a) and (c) in that they ordered a 5% pay raise within the time period prescribed by the statute.

[1][2][3] We hold that the pay increase, which was less than the 10% increase authorized by § 52.051(d), was a ministerial act to be performed by the Commissioners Court and an act in which the Legislature left no discretion. The Commissioners Court acted in violation of the statute in not setting the salaries prescribed by the District Judges pursuant to § 52.051. The court of appeals erred in granting mandamus relief in favor of the Commissioners Court against the District Judges since the granting

of the pay raise was a nondiscretionary ministerial act. *See Vondy v. Commissioners Court of Uvalde County,* 620 S.W.2d 104, 109 (Tex.1981). The performance of a clear statutory duty which is ministerial and nondiscretionary may be directed by the District Court without notice and hearing in the absence of a statutory requirement to the contrary. Section 52.051 does not require the District Judges to provide notice and hearing.

[4] The Texas Constitution has invested the Legislature with the authority to provide for and compensate the district court reporters. TEX.CONST. art. III, § 44. The Legislature has in turn delegated to the District Judges the responsibility for setting the salaries of the district court reporters paid from county funds. TEX.GOV'T CODE ANN. § 52.051 (Vernon 1988). By virtue of its express constitutional and statutory authority, the District Judges' actions have a presumption of validity and are subject to being abrogated by the Commissioners Court only upon proof that the judiciary's actions are extravagant, arbitrary, or unwarranted. *See District Judges of the 188th Judicial District v. County Judge and Commissioners Court for Gregg County,* 657 S.W.2d 908, 910 (Tex.App.—Texarkana 1983, writ ref'd n.r.e.). We are confident that the court of appeals will vacate its order issuing writ of mandamus. We note that the Commissioners Court has filed a petition for declaratory judgment that § 52.051 is unconstitutional.***80** The issues in that lawsuit are not before us and we express no opinion regarding the statute's constitutionality.

SPEARS, J., concurs and WALLACE, ROBERTSON, KILGARLIN and MAUZY, JJ., join.

SPEARS, Justice, concurring.

I concur in the court's opinion authored by Justice Ray. I would go further and hold that, even in the absence of a statutory provision, a court has the inherent power to compel the expenditure of those public funds which are reasonably necessary for the court to efficiently fulfill its constitutional function. *Vondy v. Commissioners Court of Uvalde County,* 620 S.W.2d 104, 109–110 (Tex.1981); *see also Eichelberger v. Eichelberger,* 582 S.W.2d 395, 398–399 (Tex.1979). On this basis alone, a district judge may set a reasonable salary for a court reporter.

Like the power to punish for contempt, a court's inherent power to compel funding flows from the law of self-preservation. No legislative authority, state or local, can so tighten the purse strings of the judiciary's budget that it fails to provide the funds reasonably necessary for the court's efficient and effective operation. To adhere to any contrary view would effectively concede to the legislature the power to render inoperative the judicial branch of government. It could force the judiciary into the role of a subordinate and supplicant governmental service—in effect, a mere agency. [FN1] The judiciary is not an agency, but is a constitutionally established separate, equal and independent branch of government. *See LeCroy v. Hanlon,* 713 S.W.2d 335 (Tex.1986).

> FN1. The Pennsylvania Supreme Court has explained the problem as follows:
>
> > Unless the legislature can be compelled by the courts to provide the money which is reasonably necessary for the proper functioning and administration of the courts, our entire judicial system could be extirpated, and the legislature could make a mockery of our form of government with its three co-equal branches—the executive, the legislative and the judicial.
> >
> > *Commonwealth ex rel. Carroll v. Tate,* 442 Pa. 45, 274 A.2d 193, 199, *cert. denied,* 402 U.S. 974, 91 S.Ct. 1665, 29 L.Ed.2d 138 (1971).

The courts of Texas derive their judicial power directly from the constitution. Tex. Const. art. V, § 1. This inherent power of the courts to preserve their efficient functioning thus derives from the

very creation of the judiciary as a separate branch of government. Indeed, the Texas Constitution not only mandates that the courts shall exercise the judicial power of the state but also *expressly* mandates a separation of governmental powers into three distinct branches.[FN2] Tex. Const. art. II, § 1. The purpose behind the separation of governmental powers was to avoid the concentration of political power in the hands of a few—i.e. to avoid tyranny. *See* 1 Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 89 (1977), *citing The Federalist* No. 47 (J. Madison).

> FN2. In this sense, the Texas Constitution differs from the U.S. Constitution, which by its structure, merely implies a separation of powers. Yet, even without an express constitutional provision, the separation of powers doctrine is nevertheless an unquestioned fundamental of the federal system also.

Thus, this inherent power of the courts is necessary not only to preserve the judicial branch of government, but also to preserve for the people *their* security and freedom. The judicial power provides a check on the abuse of authority by other governmental branches. If the courts are to provide that check, they cannot be subservient to the other branches of government but must ferociously shield their ability to judge independently and fairly. This is the essence of our very existence; we owe the people of Texas no less than our unflinching insistence on a true tripartite government. It is the responsibility of this court to preserve this constitutional framework.

The inherent power of the courts to compel funding thus arises out of principles and doctrines that are so thoroughly embedded as to form the very foundation of our governmental structure. The judiciary may often be denominated as the "third" branch of government, but that does not ***81** mean it is third in importance; it is in reality one of three equal branches. [FN3] As such, the judiciary is an integral part of our government and cannot be impeded in its function by legislative intransigence in funding.

> FN3. The traditional denomination of the judiciary as the "third" branch undoubtedly derives from the fact that, in the U.S. Constitution, the judiciary is established under Article III while the legislative and executive branches are established under articles I and II respectively.

The proposition that courts possess the inherent power to compel the expenditure of public funds for their own operation is not a recent innovation. Nationwide, courts have used their inherent powers to compel funding for a wide variety of essentials. As far back as 1874, the Wisconsin Supreme Court declared that its janitor was a skilled, confidential employee and held:

> It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity.

In re Janitor of Supreme Court, 35 Wis. 410, 419 (1874). In 1902, the Nevada Supreme Court requested chairs and carpet from the Board of Commissioners which, by statute, controlled the expenditure of all appropriations for furnishing, maintaining and repairing the capitol buildings and grounds. When the Board refused the request, the court itself made the purchase and then ordered the Board to pay the bill. The court stated:

> If this Board has the absolute control, as claimed, then, by refusing to furnish the courtroom with a stove or other means of heating, could it obstruct the court in its jurisdiction during a greater part of each year. By refusing tables it could prevent the court making records required by law. To assume that the legislature did confer any such absolute power upon the Board is to assume that the legislature possesses unlimited power of legislation in that matter,—that it could by hostile legislation destroy the judicial department of the government of this state.

State ex rel. Kitzmeyer v. Davis, 26 Nev. 373, 68 P. 689, 690–691 (1902).

More recently, a relatively minor expenditure led the Massachusetts Supreme Judicial Court to an emphatic assertion of its inherent powers. When there was no stenographer available, a lower court judge secured the parties' consent to use a tape recorder as a substitute. No tape recorder was available at the courthouse; so an $80.00 tape recorder and $6.00 worth of tapes were immediately purchased from a local store. Stating that it was "a necessary expense" of the court, the judge forwarded the invoice to the county treasurer. The county treasurer refused to pay the bill; he contended that, outside of specific statutory provisions, the court had no authority to bind the county for the purchase of goods or services and that there was no specific appropriation in the county budget for a tape recorder. However, when the case was presented to the Massachusetts Supreme Judicial Court, that court rejected the county treasurer's contentions and held:

> [A]mong the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel. To correct such an impairment, a judge may, even in the absence of a clearly applicable statute, obtain the required goods or services by appropriate means, including arranging himself for their purchase and ordering the responsible executive official to make payment. It is not essential that there have been a prior appropriation to cover the expenditure. Where an obligation is thus legally incurred, it is the duty of the state, or one of its political subdivisions, to make payment.

O'Coin's Inc. v. Treasurer of County of Worcester, 362 Mass. 507, 287 N.E.2d 608, 612 (1972).

The Indiana courts have used their inherent powers to order the installation of a more modern and efficient telephone service. *State v. Superior Court of Marion County, Rm. No. 1,* 264 Ind. 313, 344 N.E.2d 61 (1976). The expenditure of funds for ***82** air conditioning was compelled by the Wisconsin Supreme Court. *State ex rel. Reynolds v. County Court of Kenosha County,* 11 Wis.2d 560, 105 N.W.2d 876 (1960).

Numerous courts have held that the hiring of court personnel and the designation of staff salaries are matters over which courts may properly exercise their inherent powers. *Mowrer v. Rusk,* 95 N.M. 48, 618 P.2d 886 (1980); *In the Matter of Court Reorganization Plan of Hudson County,* 161 N.J.Super. 483, 391 A.2d 1255 (1978), *aff'd* 78 N.J. 498, 396 A.2d 1144, *cert. denied sub nom. Clark v. O'Brien,* 442 U.S. 930, 99 S.Ct. 2861, 61 L.Ed.2d 298 (1979); *McAfee v. State ex rel. Stodola,* 258 Ind. 677, 284 N.E.2d 778 (1972); *State ex rel. Schneider v. Cunningham,* 39 Mont. 165, 101 P. 962 (1909); *Smith v. Miller,* 153 Colo. 35, 384 P.2d 738 (1963) (en banc). In *Noble County Council v. State ex rel. Fifer,* 234 Ind. 172, 125 N.E.2d 709 (1955), the Supreme Court of Indiana expressly recognized that this power of the courts to employ necessary personnel and fix their salaries was grounded on the most fundamental of constitutional principles and was also mandated by the open courts provision of the Indiana constitution. The court explained:

> These mandates necessarily carry with them the right to quarters appropriate to the office and personnel adequate to perform the functions thereof. The right to appoint a necessary staff of personnel necessarily carries with it the right to have such appointees paid a salary commensurate with their responsibilities. The right cannot be made amenable to and/or denied by a county council or the legislature itself. Our courts are the bulwark, the final authority which guarantees to every individual his right to breathe free, to prosper and be secure within the framework of a constitutional government. The arm which holds the scales of justice cannot be shackled or made impotent by either restraint, circumvention or denial by anoth-

er branch of that government.

Id., 125 N.E.2d at 714. Some courts have expressly concluded that, as a matter of constitutional law, the judiciary must *directly* control court personnel. *Mowrer v. Rusk,* 95 N.M. 48, 618 P.2d 886 (1980); *Holohan v. Mahoney,* 106 Ariz. 595, 480 P.2d 351 (1971) (en banc); *Massie v. Brown,* 9 Wash.App. 601, 513 P.2d 1039 (1973), *aff'd,* 84 Wash.2d 490, 527 P.2d 476 (1974) (en banc). On this basis, these courts have held that court employees are not entitled to the protections of a general civil service system.

Finally, courts may even compel payment of those expenses which are reasonably necessary for the court to exercise its inherent powers. Thus, if it becomes necessary for a court to retain counsel in order to litigate an exercise of inherent powers, then payment of attorney fees may also be compelled. *Young v. Board of County Commissioners,* 91 Nev. 52, 530 P.2d 1203 (1975).

These cases demonstrate the widespread acceptance of the doctrine of courts' inherent powers. Indeed, in 1965, a statement of principles asserting the need for financial independence of the courts was adopted by the Conference of Chief Justices, by the National Conference of Court Administrators, and by most of the countries of North and South America at the First Judicial Conference of the Americas. *Statement of Principles: The Need for Independence in Judicial Administration,* 50 Judicature 129 (1966); *Judicial Independence is Keynote of Judicial Conference of the Americas,* 49 J.Am.Jud.Soc'y 44 (1965).

The process of allocating public resources is complex. Both state and local legislative bodies make difficult decisions when faced with competing priorities. Political and economic considerations often result in the relatively unassertive requests of the judiciary being neglected. However, unlike state agencies, courts cannot reduce services. The judiciary can only delay or postpone the disposition of justice. Legislative leaders must realize that courts have been neglected for too long and must now receive greater financial support. In this day and time, with ever increasing dockets, modern word-processing equipment, computers, and skilled personnel to assist with ***83** the workload may often be as critical as heating stoves. The judiciary can no longer permit its efficiency and progress to be stymied by legislators who apparently misunderstand the constitutional role and function of the judiciary as a separate, independent and equal branch of government. Ultimately, the legislative branch of government cannot be permitted to cripple the judicial branch by refusing needed appropriations. The "power of the purse" is a legislative power but it is not an absolute power; it may not be used to divest the court of its ability to function independently and effectively.

Although the judiciary retains the inherent power to compel necessary funding, a spirit of mutual cooperation is unquestionably the people's best guarantee of a constitutional government. Rather than being a source of contention, the judiciary's insistence on its own inherent powers can open an avenue for greater cooperation among the branches of government. Only by recognizing each other as equals can we effectively communicate.

The judiciary's power to compel funding is not dependent on legislative authority. However, in this particular instance, the district judges did act pursuant to an express statutory mandate in setting the court reporters' salaries. Tex.Gov't Code Ann. § 52.051 (Vernon 1988). They acted entirely within the scope of that statute, and the statute does not require that the county commissioners court be provided with notice and hearing. The absence of provision for notice and hearing may be questionable, but the statute's constitutionality is not an issue which we are now called upon to decide.

WALLACE, ROBERTSON, KILGARLIN and MAUZY, JJ., join in this concurring opinion.

Tex.,1988.
Mays v. Fifth Court of Appeals

755 S.W.2d 78
(Cite as: 755 S.W.2d 78)

755 S.W.2d 78

END OF DOCUMENT

620 S.W.2d 104
(Cite as: 620 S.W.2d 104)

H

Supreme Court of Texas.
H. T. VONDY, Petitioner,
v.
COMMISSIONERS COURT OF UVALDE COUNTY, Texas et al., Respondents.

No. B-9727.
July 22, 1981.
Rehearing Denied Sept. 16, 1981.

Duly elected constable sought writ of mandamus against commissioners court and four of its five members to compel them to set a reasonable salary for his office. The District Court, No. 38, Uvalde County, Woodley, J., entered judgment denying petitioner relief, and the Eastland Court of Civil Appeals, Eleventh Supreme Judicial District, Brown, J., 601 S.W.2d 808, vacated trial court's judgment and dismissed the cause. Petitioner appealed. The Supreme Court, Spears, J., held that: (1) it was not fundamental error to omit the fifth commissioner, individually, as a respondent in the petition for writ of mandamus, and (2) county commissioners court had duty to set a reasonable salary for the constable.

Reversed and remanded.

Greenhill, C.J., and McGee, Denton and Barrow, JJ., concurred in result.

West Headnotes

[1] Mandamus 250 ⇐151(2)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k150 Parties Defendant or Respondents
250k151 In General
250k151(2) k. Public Officers and Boards and Municipalities. Most Cited Cases
In petition for writ of mandamus brought by constable against commissioner's court and four of its five members to compel respondents to set a reasonable salary for petitioner's office, it was not fundamental error to omit, as a respondent, the fifth commissioner, who was willing to comply with statute in the dispute, where interests of all parties could have been adjudicated and complete relief given and the remaining commissioners would not have been subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations due to absence of the fifth commissioner. Vernon's Ann.Civ.St. art. 3883i, § 1; Rules of Civil Procedure, Rule 39.

[2] Mandamus 250 ⇐1

250 Mandamus
250I Nature and Grounds in General
250k1 k. Nature and Scope of Remedy in General. Most Cited Cases
Mandamus is a legal proceeding and, although extraordinary, rules of civil procedure are applicable.

[3] Sheriffs and Constables 353 ⇐28

353 Sheriffs and Constables
353II Compensation
353k28 k. Right in General. Most Cited Cases
County commissioners court had duty to set reasonable salary for duly elected constable. Vernon's Ann.St.Const. Art. 16, § 61.

[4] Courts 106 ⇐207.4(3)

106 Courts
106VI Courts of Appellate Jurisdiction
106VI(A) Grounds of Jurisdiction in General
106k207 Issuance of Prerogative or Remedial Writs
106k207.4 Mandamus
106k207.4(1) Jurisdiction in General; Subjects and Purposes of Relief
106k207.4(3) k. Public Officers, Boards, and Municipalities, Acts and Proceedings

Of. Most Cited Cases

Mandamus 250 ⇐65

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k65 k. County or Town Boards and Officers. Most Cited Cases
Supreme Court lacks original mandamus jurisdiction over county officials but, rather, that power is vested in district court in exercise of its general supervisory control over orders of commissioners court; while such jurisdiction is not used to substitute discretion of district court for that of the public official, performance of a clear statutory duty which is ministerial and nondiscretionary should be mandated by district court and, even in matters involving some degree of discretion, commissioners court may not act arbitrarily. Vernon's Ann.St.Const. Art. 5, § 8.

[5] Mandamus 250 ⇐65

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k65 k. County or Town Boards and Officers. Most Cited Cases
Mandamus sought by constable in his petition against county commissioners court to compel them to set a reasonable salary was proper and should have been granted by district court. Vernon's Ann.St.Const. Art. 5, § 8.

***104** Harry A. Nass, Jr., James M. Parker, San Antonio, for petitioner.

David R. White, Uvalde, for respondents.

SPEARS, Justice.

This is an appeal from a mandamus action. Petitioner H. T. Vondy, the duly elected constable of Precinct 6 in Uvalde County, sought a writ of mandamus against the Commissioners Court of Uvalde County and four of its five members, County Judge J. R. White, Commissioners Gene Isle, Gilbert Torres, and Norment Foley, to compel ***105** them to set a reasonable salary for Vondy's office. One commissioner, Woodrow Head, was not named as a party, but no objection was made to his absence in the trial court. The trial court entered judgment denying Vondy relief. The court of civil appeals vacated the trial court's judgment and dismissed the cause, holding the failure to join Commissioner Woodrow Head was fundamental error. 601 S.W.2d 808. We reverse the judgment of the court of civil appeals and remand the cause to the trial court for further proceedings consistent with this opinion.

Two issues are presented in this appeal: first, was it fundamental error to omit Commissioner Head, individually, as a respondent in Vondy's petition for writ of mandamus; second, is it the duty of the county commissioners court to set a reasonable salary for its duly elected constables?

Vondy was elected to the office of constable, Precinct 6, Uvalde County, Texas on November 4, 1978, and took his oath of office on January 17, 1979. Vondy appeared before the commissioners court requesting that a salary be set for his office. The commissioners other than Head, voted not to set a salary for Vondy. Vondy then petitioned the district court for a writ of mandamus against the commissioners court and each of the commissioners, individually, except Head. The trial court denied Vondy any relief. The failure of Vondy to name Head in his petition was not brought up before the district court by any type of plea or as a point of error before the court of civil appeals. The court of civil appeals, on its own motion, held that Commissioner Head's absence from the mandamus petition was fundamental error since he was an indispensable party to the suit, citing Gaal v. Townsend, 77 Tex. 464, 14 S.W. 365 (1890). The court of civil appeals then dismissed the cause.

Vondy contends that the commissioners court

must fix a reasonable salary for him pursuant to Tex.Rev.Civ.Stat.Ann. art. 3883i, s 1 (Vernon's 1971), which provides:

> Section 1. That in each county in the State of Texas having the population of less than twenty thousand (20,000) inhabitants according to the last preceding federal census where all county and district officials are compensated on a salary basis, the Commissioners Court shall fix the salaries of the officials named in this Act at not more than Six Thousand, Seven Hundred and Fifty Dollars ($6,750) per annum; provided, however, that no salary shall be set at a figure lower than that actually paid on the effective date of this Act.[FN1]

FN1. All statutory references are to Texas Revised Civil Statutes Annotated.

Vondy argues that Head was not an indispensable party because Head was willing to comply with the statute in this dispute. The commissioners argue that Woodrow Head was an indispensable party and the failure of Vondy to name Head individually in his petition was fundamental error.

Rule 39, Tex.R.Civ.P. governs the joinder of parties to a lawsuit. The present rule was completely rewritten in 1970 to remedy much of the confusion and criticism leveled at prior Rule 39. See Dorsaneo III, Compulsory Joinder of Parties in Texas, 14 Hou.L.R. 345, 359 (1977). Present Rule 39 provides in part:

> Rule 39. Joinder of Persons Needed for Just Adjudication
>
> (a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.
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> ***106** (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Prior to the enactment of the present rule, the courts drew a distinction between necessary and indispensable parties.[FN2] In Petroleum Anchor Equipment, Inc. v. Tyra, 406 S.W.2d 891 (Tex.1966), this court interpreted prior Rule 39. We stated that the language of Rule 39(a), when properly interpreted, constituted the rule's definition of "indispensable" parties whose joinder in the trial court is essential to the court's jurisdiction. Therefore, if a person were truly indispensable, it would be fundamental error to proceed in his absence. Id. at 892.

FN2. Prior Rule 39 provided in part:

> Necessary Joinder of Parties.
>
> (a) Necessary joinder. Except as other-

> wise provided in these rules, persons having a joint interest shall be made parties and be joined as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
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> (b) Effect of failure to join. When persons who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court, the court shall order them made parties. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein shall not affect the rights or liabilities of persons who are not parties.
>
> (c) Names of omitted persons and reasons for non-joinder to be pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties, if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

In 1970, using Federal Rule 19 as its source, this court completely changed Rule 39. Then, in Cooper v. Texas Gulf Industries, Inc., 513 S.W.2d 200 (Tex.1974), we reviewed the new rule. There, the spouses acting together bought realty which was conveyed to both of them. The husband sued the grantor to rescind the transaction in 1970. The wife was not a party to the suit. The husband's suit was later dismissed with prejudice. Subsequently, in 1971, a suit for similar relief was brought by the husband and wife jointly. The grantor sought summary judgment on the basis of res judicata, asserting that both the husband and wife were bound by the prior judgment. We held that the judgment of dismissal was res judicata as to the claims of the husband in the second suit. We pointed out that prior to the enactment of new Rule 39, failure to join the wife would be jurisdictional, but stated: "(T)oday's concern is less that of the jurisdiction of a court to proceed and is more a question of whether the court ought to proceed with those who are present." We then observed: "under the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined."

[1] To determine whether a party is jurisdictionally indispensable under Rule 39 the surrounding facts and circumstances of each case must be examined. In the present case, the facts fail to warrant a finding that Commissioner Head was truly an indispensable party under our interpretation of Rule 39 Tex.R.Civ.P. This is not a situation where a judgment would adversely affect the interests of absent parties who ***107** had no opportunity to assert their rights in the trial court. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110, 126, 88 S.Ct. 733, 746, 19 L.Ed.2d 936 (1968) . Here, the interests of all the parties could be adjudicated and complete relief given. Further, the remaining commissioners would not be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations due to the absence of Commissioner Head. We conclude, therefore, that because Head was not an indispensable party to the proceeding, the nonjoinder of Head was not fundamental error.

The commissioners contend that the rules relating to indispensable parties are modified in this case because this is a mandamus action. They rely on Gaal v. Townsend, supra, which involved an action to procure a writ of mandamus to compel the county judge to permit the appellant to perform his duties as a county commissioner. The other members of the commissioners court were not made

parties to the suit. We stated: "When the performance of a duty is sought to be compelled by the writ of mandamus, all persons charged with the performance of that duty must be made parties defendant in the writ."

Part of the rationale behind the Gaal v. Townsend decision was that only a majority of the commissioners could permit the appellant to perform his duties as a county commissioner. We stated:

> The other members of the (commissioners) court, not being parties to the writ, could not be affected by any judgment that might be rendered, and could not be held in contempt for refusing to admit the plaintiff to act as a member, although this court should in this suit declare him entitled to the office, and command the defendant Townsend to admit him as such. It is clear that a mandamus should not issue to compel the county judge to do an act which could only be performed with the consent of others.

In the present suit three of the four commissioners and the county judge were made parties individually. The commissioners court itself was also named. Therefore, the reasoning of Gaal v. Townsend is not applicable in the present situation.

Further, the fact that the commissioners court itself was named in the petition distinguishes this cause from Gaal v. Townsend under the holding in Rodriquez v. Richmond, 234 S.W.2d 248 (Tex.Civ.App. San Antonio 1950, writ ref'd). That case involved a mandamus suit brought against the county judge to compel an election for the incorporation of an independent school district for the election of trustees. The county judge was not sued in his individual capacity but rather in his official capacity as county judge. No question was raised as to the capacity of the county judge until after appeal had been perfected. The court of civil appeals held that the Texas Rules of Civil Procedure were now controlling and disavowed the early case of City of Beaumont v. Stephenson, 95 S.W.2d 1360 (Tex.Civ.App. Beaumont 1936, writ ref'd n.r.e.). In Stephenson, the court had held that officers acting in their personal capacities in refusing to perform a duty are necessary parties in those capacities. The Rodriquez court interpreted Rule 358, Tex.R.Civ.Civ.P., as providing that a named public officer in a mandamus suit may be made a party in his official capacity.[FN3] Further, since Rule 93 required that the lack of capacity of a party defendant to be sued must be raised by verified pleading, defendant's failure to do so constituted a waiver under Rule 90. The failure to name the county judge in his personal capacity was specifically held to not be fundamental error. Id. at 250.

FN3. Rule 358 Tex.R.Civ.P. provided in part:

> (a) When a suit in mandamus or injunction is brought against a person holding a public office, in his official capacity, and after final trial and judgment in the trial court, and notice of appeal to the Court of Civil Appeals or Supreme Court has been given, if such person should vacate such office, the suit shall not abate, but his successor may be made a party thereto by a motion showing such facts. (emphasis added) (This rule was amended in 1976 to eliminate the reference to notice of appeal as an appellate step.)

***108** [2] We think the reasoning in Rodriquez is correct. Mandamus is a legal proceeding and although extraordinary, the Rules of Civil Procedure are applicable. The commissioners court was officially named although Commissioner Head was not named individually. The commissioners did not point out any defect in Vondy's petition relating to the omission of Commissioner Head and the capacity in which the commissioners court was sued. The failure to name Head individually in this mandamus action was not fundamental error. Gaal v. Townsend, supra, was decided long before the present Rules were enacted and is not controlling.

Consequently, Vondy's failure to join all four county commissioners was not fundamental error. Since the commissioners court did not raise the point, the court of civil appeals should not have dismissed the case, but should have considered the merits of Vondy's mandamus action against the commissioners.

We now turn to the question of the duty of the commissioners court to set a reasonable salary for the position of constable. The Texas Constitution art. XVI s 61 (amended 1972) provides in part as follows:

> In all counties in this State, the Commissioners Courts shall be authorized to determine whether precinct officers shall be compensated on a fee basis or on a salary basis, with the exception that it shall be mandatory upon the Commissioners Courts, to compensate all justices of the peace, constables, deputy constables and precinct law enforcement officers on a salary basis beginning January 1, 1973; .... (emphasis added)

Thus, it is mandatory that the commissioners court compensate constables on a salary basis.

The commissioners court argues that this constitutional provision only requires the court to compensate these officials on a salary basis if they are compensated at all. It reasons that if the officials have never been compensated, they need not be compensated. The purpose of the amendment was to prohibit the practice of compensating justices on a fee basis. Wichita County v. Robinson, 155 Tex. 1, 276 S.W.2d 509 (1954). Therefore, it asserts that the provision is a mandate that constables be compensated, if at all, on a salary basis. Additionally, it urges that since no other statute mandates a minimum salary, the commissioners court has discretion to set no salary at all.

The commissioners court next argues that since Vondy is also a Class B Security Service Contractor [FN4] and operates the business for profit, the trial court did not abuse its discretion in denying the mandamus. It argues that a person cannot accept a public office knowing the amount of compensation and then claim more is due, citing Terrell v. King, 118 Tex. 237, 14 S.W.2d 786, 791 (1929) . Vondy replies that this does not apply when the amount of compensation is mandated by law. Broom v. Tyler County Commissioners Court, 560 S.W.2d 435, 437 (Tex.Civ.App. Beaumont 1977, no writ). Also the commissioners court contends that there was no money budgeted or available with which to pay Vondy at the time of his request.

> FN4. Article 4413(29bb), s 16(b)(2) and s 2(9) defines a security service contractor as "any guard company, alarm systems company, armored car company, courier company, or guard dog company as defined herein."

A final argument made by the commissioners court is that by setting no salary, the court has set a salary. In any event, it contends that the constitutional provision does not mandate that it set a reasonable salary, which Vondy is requesting.

[3] We do not find the commissioners courts' arguments persuasive. The constitutional provision clearly mandates that constables receive a salary. While cases cited by the commissioners court point out that the constitutional provision was amended to stop the practice of paying constables on a fee basis, this does not lead to the conclusion that constables need not now be compensated at all. Furthermore, we conclude that the commissioners court must ***109** set a reasonable salary. While a reasonable salary would be a determination for the commissioners court, Vondy is entitled to be compensated by a reasonable salary. Any other interpretation of the provision would render it meaningless.

We also note, that by failure to pay a salary to Vondy, the commissioners court could be subject to prosecution under Tex.Penal Code Ann. s 39.01 (a)(3) (Vernon 1974), for failure to perform its duties imposed by law. By this statute, the legislature

recognized the necessity that public officials perform the duties required of them by law and provided sanctions for their failure to do so when the failure was intentional and to obtain a benefit or harm another.

[4][5] This court lacks original mandamus jurisdiction over county officials. Cocke v. Smith, 142 Tex. 396, 179 S.W.2d 958 (1944). Rather, that power is vested in the district court in the exercise of its general supervisory control over the orders of the commissioners court. Art. V s 8 Tex.Const.; Grant v. Ammerman, 437 S.W.2d 547, 550 (Tex.1969); and Article 1908. While such jurisdiction is not used to substitute the discretion of the district court for that of the public official, Weber v. City of Sachse, 591 S.W.2d 559 (Tex.Civ.App. Dallas 1979, no writ), the performance of a clear statutory duty which is ministerial and nondiscretionary should be mandated by the district court. Wichita County v. Griffin, 284 S.W.2d 253 (Tex.Civ.App. Ft. Worth 1955, writ ref'd n.r.e.) . Even in matters involving some degree of discretion, the commissioners court may not act arbitrarily. Avery v. Midland County, 406 S.W.2d 422, 428 (Tex.1966); Stovall v. Shivers, 129 Tex. 256, 103 S.W.2d 363, 367 (1937). Here, the district court should have granted the mandamus sought by Vondy.

There is another compelling reason that mandamus is proper in this case. This court, as well as the trial court, has inherent power to act to protect and preserve the proper administration of the judicial system. The Texas Constitution now recognizes this fundamental principle by providing that the Supreme Court "shall exercise the judicial power of the State except as otherwise provided in this Constitution." Tex.Const. Art. V s 3 (effective September 1, 1981). We recently discussed and recognized the inherent power to the judicial branch in Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex.1979) . In Eichelberger, we listed examples of the exercise of inherent power by courts in Texas and other jurisdictions. 582 S.W.2d at 398 n. 1. Texas courts have recognized their inherent powers to control their judgments, e. g., Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040, 1041 (1912), to punish by contempt, e. g., Ex Parte Barnett, 600 S.W.2d 252, 254 (Tex.1980), to summon and compel the attendance of witnesses, e. g., Burttschell v. Sheppard, 123 Tex. 113, 69 S.W.2d 402, 403 (1934), and to regulate the admission to the practice of law, e. g., State Bar of Texas v. Heard, 603 S.W.2d 829, 831 (Tex.1980); Scott v. State, 86 Tex. 321, 24 S.W. 789, 790 (1894). In one instance, a Texas court recognized that a district court would have the power to appoint probation personnel and set their compensation, if that action were necessary for the effective administration of the business of the court. Commissioners Court of Lubbock County v. Martin, 471 S.W.2d 100, 110 (Tex.Civ.App. Amarillo 1971, writ ref'd n.r.e.).

Other state courts have often recognized the necessity of this inherent power to compel payment of sums of money if they are reasonable and necessary in order to carry out the court's mandated responsibilities. This power is necessary for the judiciary to carry out its functions, independently of the other branches of government. Carlson v. State ex rel. Stodola, 247 Ind. 631, 220 N.E.2d 532 (1966) . This inherent power is also necessary to protect and preserve the judicial powers from impairment or destruction. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886, 892 (1980); Judges for the Third Judicial Circuit v. County of Wayne, 386 Mich. 1, 190 N.W.2d 228, 231 (Mich.1971), cert. denied, 405 U.S. 923, 92 S.Ct. 961, 30 L.Ed.2d 794 (1972). See also Annot., 59 A.L.R.3d 569 (1974).

***110** In particular, courts have employed their inherent power to hire and require salaries be paid for secretaries, Millholen v. Riley, 211 Cal. 29, 293 P. 69, 71 (1930), clerks, Smith v. Miller, 153 Colo. 35, 384 P.2d 738, 741 (1963), probation officers, Noble County Council v. State ex rel. Fifer, 234 Ind. 172, 125 N.E.2d 709, 714 (1955), and assistants, In Re Matter of Court Reorganization Plan of Hudson County, 161 N.J.Super. 483, 391 A.2d

1255, 1259 (1978). In Commonwealth ex rel. Carroll v. Tate, 442 Pa. 45, 274 A.2d 193 (1971), cert. denied, 402 U.S. 974, 91 S.Ct. 1665, 29 L.Ed.2d 138 (1971), the court issued a mandamus requiring the city council of Philadelphia to appropriate additional funds necessary to adequately administer the court of common pleas. In 1857, the Supreme Court of Pennsylvania required the county to compensate a constable for his services because of the benefit derived by the county for such services in the preservation of order and administration of justice. Lancaster County v. Brinthall, 29 Pa. 38, 40 (1857).

We hold that the county commissioners of Uvalde County must compensate the county's constables. The judicial system of this state cannot function properly if those officials who are responsible for carrying out certain duties in that process are not properly compensated. Tex.R.Civ.P. 103 allows constables to serve process in this state. If these constables are not compensated for their services the judicial process will be impaired because process may not be served. It is the duty of the commissioners court to provide process servers as a necessary part of the proper administration of justice in this state, and to compensate them adequately. See Pope & McConnico, Practicing Law With the 1981 Texas Rules, 32 Baylor L.Rev. 457, 484-86 (1980). Constables, provided for in the "Judicial Branch" Article of the Constitution, Tex.Const. Art. V s 18, additionally serve other functions necessary to the judicial branch of the state.

Even though the commissioners court is also part of the judicial branch of this state, existing under Article V Section 1 of the Texas Constitution, this fact does not alter our powers to protect and preserve the judiciary by compelling payment for process servers. The legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately. If this were not so, a legislative body could destroy the judiciary by refusing to adequately fund the courts. The judiciary must have the authority to prevent any interference with or impairment of the administration of justice in this state.

Accordingly, the judgment of the court of civil appeals is reversed and the cause is remanded to the district court of Uvalde County for further proceedings consistent with this opinion.

GREENHILL, C. J., and McGEE, DENTON and BARROW, JJ., concur in the result.

Tex., 1981.
Vondy v. Commissioners Court of Uvalde County
620 S.W.2d 104

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SUBCHAPTER B. AMOUNT OF COMPENSATION, EXPENSES, AND ALLOWANCES GENERALLY APPLICABLE

Sec. 152.011. AMOUNT SET BY COMMISSIONERS COURT. The commissioners court of a county shall set the amount of the compensation, office and travel expenses, and all other allowances for county and precinct officers and employees who are paid wholly from county funds.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

Sec. 25.2362. VAN ZANDT COUNTY COURT AT LAW PROVISIONS. (a) In addition to the jurisdiction provided by Section 25.0003 and other law, and except as limited by Subsection (b), a county court at law in Van Zandt County has concurrent jurisdiction with the district court in:

(1) felony cases to:

(A) conduct arraignments;

(B) conduct pretrial hearings;

(C) accept guilty pleas; and

(D) conduct jury trials on assignment of a district judge presiding in Van Zandt County and acceptance of the assignment by the judge of the county court at law;

(2) Class A and Class B misdemeanor cases;

(3) family law matters;

(4) juvenile matters;

(5) probate matters; and

(6) appeals from the justice and municipal courts.

(b) A county court at law's civil jurisdiction concurrent with the district court in civil cases is limited to cases in which the matter in controversy does not exceed $200,000. A county court at law does not have general supervisory control or appellate review of the commissioners court or jurisdiction of:

(1) suits on behalf of this state to recover penalties or escheated property;

(2) felony cases involving capital murder;

(3) misdemeanors involving official misconduct; or

(4) contested elections.

(c) The judge of a county court at law must have the same qualifications as those required by law for a district judge.

(d) The judge of a county court at law shall be paid a total annual salary set by the commissioners court at an amount that is not less than $1,000 less than the total annual salary received by a district judge in the county. A district judge's or statutory county court judge's total annual salary does not include contributions and supplements paid by a county.

(e) The judge of a county court at law may not engage in the private practice of law.

(f) The district clerk serves as clerk of a county court at law

EXHIBIT 1

IN RE	§	**IN THE COUNTY**
SHELLY CROSSLAND	§	**COURT AT LAW**
	§	**VAN ZANDT, TEXAS**

ORDER

On or before July 29, 2011, this Court pursuant to its enabling statute recommended the salary of its Official Court Reporter to be set at $48,006.40, a fair and reasonable salary. TEX. GOV'T CODE ANN. § 25.2362. The members of the Commissioners' Court, acting outside of their statutory authority, voted to eliminate this statutorily mandated and appointed position as a salaried position. The Commissioners' Court designated the position of Official Court Reporter for this Court as a part-time contract position, removed salaried benefits for the position, and set this Court's budget for a part-time contract court reporting at $24,000.00 effective October 1, 2011.

The Court finds that the position of Official Court Reporter for this Court is a full time position and that designating the position as part-time contract labor will unduly interfere with the ability of this Court to efficiently and effectively fulfill its constitutional and statutory functions.

The Court further finds that an annual salary of $48,006.40 plus benefits is a reasonable salary for the Official Court Reporter position, is a salary commensurate with the responsibilities of an Official Court Reporter, and is lower than the annual salary of $54,086.27 of the Official Court Reporter of the 294th District Court of Van Zandt County.

The Court further finds that the county commissioners acted in an arbitrary and capricious manner in designating the position as part-time contract labor and allocating a mere $24,000.00 in this Court's budget for Court Reporting.

The Court further finds that its caseload has nearly doubled with the recent discovery, in large part due to the efforts of Shelly Crossland, of approximately 1450 previously dormant misdemeanor cases in which approximately $1.375 million in defaulted court costs, fines and fees to the State and Van Zandt County that have gone uncollected, and will require extensive hearings mandated by law.

The Court takes judicial notice of the inherent power of courts to compel funding that arises out of principles and doctrines so thoroughly embedded in our history as to form the very foundation of our governmental structure. The Supreme Court of Texas has reviewed the long history of this inherent power throughout our state and nation, and has stated , "this inherent power of the courts is necessary not only to preserve the judicial branch of government, but also to preserve for the people their security and freedom. The judicial power provides a check on the abuse of authority by other governmental branches. If the courts are to provide that check, they cannot be subservient to the other branches of government but must ferociously shield their ability to judge independently and fairly. This is the essence of our very existence, we owe the people of Texas no less than our unflinching insistence on a true tripartite government." *Mays v. Fifth Circuit Court of Appeals*, 755 S.W. 2d 78 (Tex. 1988). The Court went on to state, "No legislative authority, state or local, can so

tighten the purse strings of the judiciary's budget that it fails to provide the funds reasonably necessary for the court's efficient and effective operation."

IT IS THEREFORE ORDERED, that the county commissioners and county judge of Van Zandt County, individually and as a body comprising the Commissioners' Court of Van Zandt County, rescind their order designating the position of Official Court Reporter for this Court as a part-time contract labor position, return the position to a full time salaried position with benefits, and approve the salary for the Official Court Reporter at $48,006.40 per year plus the same benefits provided to other full time non-exempt salaried employees of the County, effective October 1, 2011.

SIGNED this 15th day of September, 2011.

Randal L. McDonald

Randal L. McDonald, Judge
County Court at Law
Van Zandt County, Texas