



The Office of Vince Ryan  
County Attorney

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September 15, 2011

Luis A. Sanchez, M.D.  
Chief Medical Examiner  
Harris County Institute of Forensic Sciences  
1885 Old Spanish Trail  
Houston, Texas 77054

Opinion No. VR-0005 (2011)

Re: Whether the Chief Medical Examiner is required to take an oath of office before assuming official duties in that role; C.A. File No. 11GEN1459

Dear Doctor Sanchez:

This is in response to your request for advice asking, in substance, whether the Chief Medical Examiner of Harris County is required to take an oath of office before assuming official duties in that role. The answer to your question requires an interpretation of article 16, section 1, of the Texas Constitution, most recently amended in 2001.

Article 16, section 1(a) of the Texas Constitution provides that elected and appointed officers, before they enter upon the duties of their offices, shall take the following oath:

I, \_\_\_\_\_, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of \_\_\_\_\_ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

TEX. CONST. art. XVI, § 1(a). Article 16, section 1(b) of the Texas Constitution provides that these officers, before taking the oath and entering upon the duties of office, shall subscribe to the following statement:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of

value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God.

TEX. CONST. art. XVI, § 1(b). Article 16, section 1(c) of the Texas Constitution requires members of the Legislature, the Secretary of State, and other elected and appointed state officers to file the signed statement required by section 1(b) with the Secretary of State before taking the oath of office prescribed by section 1(a). Other officers are required to retain the signed statement required by section 1(b) “with the official records of the office.” TEX. CONST. art. XVI, § 1(c).

There are no reported decisions by Texas courts and no opinions of the Attorney General indicating whether the Chief Medical Examiner of Harris County is an “elected or appointed officer” to whom the above provisions of the Texas Constitution apply. In the absence of such guidance, your question can only be answered by analyzing previous judicial decisions and Attorney General opinions construing the word “officer.” Those decisions and opinions determined the characteristics and duties of various public servants whose role required them to take an oath and sign the statement referred to in article 16, section 1 of the Texas Constitution.

The term “officer” includes both officials whose position is created by the Constitution, and those who hold a position created by a statute that expresses the intent of the legislature to make it an “office” requiring the constitutional oath. For example, the legislature has authorized commissioners court to create the “office of county fire marshal” and required that he “must take the oath prescribed by the constitution of this state and post a bond.” *See* TEX. LOC.GOV'T CODE ANN. § 352.011 -.012 (Vernon 2005). Although the members of a Grievance Committee of the State Bar of Texas exercise powers pursuant to a statute and Supreme Court rules, the Grievance Committee is not created by the Constitution and “the constitutional oath required of officers appointed pursuant to a specific or implied constitutional grant is not required” of the committee’s members. *See Howell v. State*, 559 S.W.2d 432, 437 (Tex. App.—Tyler 1977, writ ref’d). Both the Constitution and the statute creating the office of criminal district attorney for Bexar County refers to it as an “office” – thereby requiring that she take an oath — but a special prosecutor appointed by the district attorney is not required to take the constitutional oath. *See Lopez v. State*, 437 S.W.2d 268, 269 (Tex. Crim. App. 1969).

The position of Medical Examiner is not established by the Texas Constitution. Article 49.25 of the Texas Code of Criminal Procedure provides for the establishment of the position by commissioners court. *See* TEX. CRIM. PROC. CODE ANN. art. 49.25 (Vernon 2006). The

statute authorizes commissioners court to appoint a physician licensed by the Texas Medical Board, to provide the Medical Examiner with office space and laboratory facilities, to establish and pay salaries and compensation to the Medical Examiner, assistant medical examiners and staff, who may be employed only with the approval of Commissioners Court. *See* TEX. CRIM. PROC. CODE ANN. art. 49.25, §§ 1-5 (Vernon 2006). There is no fixed term of service for a medical examiner. A medical examiner may only “serve at the pleasure of commissioners court.” TEX. CRIM. PROC. CODE ANN. art. 49.25, § 2 (Vernon 2006). The statute imposes on a medical examiner the duty to investigate deaths that occur in the county under eight listed categories of circumstances, and allows the medical examiner to administer oaths and take affidavits. *See* TEX. CRIM. PROC. CODE ANN. art. 49.25, § 6 (Vernon 2006). A medical examiner is required to immediately perform an autopsy when requested by the district attorney, criminal district attorney or county attorney (all holders of offices created by the Constitution) and to file with the requesting officer a report setting forth the autopsy findings in detail. *See* TEX. CRIM. PROC. CODE ANN. art. 49.25, § 9 (Vernon 2006). The statute does not require the medical examiner to take an oath of office or post an official bond.

The few Texas cases holding that a public official is required to take the constitutional oath of an “officer” are limited to judicial officials, and have arisen mostly in criminal cases. *See* David B. Brooks, 35 Texas Practice 2d, County and Special District Law, § 7.4 (2002). *See French v. State*, 572 S.W.2d 934 (Tex. Crim. App. 1977) (search warrant issued by magistrate); *Baker v. State*, 159 Tex. Crim. 130, 261 S.W.2d 593 (1953) (special judge in DWI case); *Garza v. State*, 157 Tex. Crim. 381, 249 S.W.2d 212 (1952) (special judge in murder case); *Brown v. State*, 156 Tex. Crim. 32, 238 S.W.2d 787 (1950) (special county judge in criminal trial); *Enloe v. State*, 141 Tex. Crim. 602, 150 S.W.2d 1030 (1941) (special judge in murder trial). A civil case (appealing a criminal bail bond forfeiture) held that a senior judge was an appointed officer required to take a new oath on appointment. *See Prieto Bail Bonds v. Tex.*, 994 S.W.2d 316 (Tex. App.—El Paso 1999, pet. ref’d). Two courts of appeals have since declined to follow its holding. *See Hennington v. State*, 144 S.W.3d 42, 44 (Tex. App.—Eastland 2004, pet. ref’d); *Delamora v. State*, 128 S.W.3d 344, 359 (Tex. App.—Austin 2004, pet. ref’d).

Some of the characteristics distinguishing a public “officer” from a public “employee” include a fixed term of office, requirement of an official bond, imposition of statutory duties, and exercise of some sovereign governmental function independent of the control of others. *See* David B. Brooks, 35 Texas Practice 2d, County and Special District Law, § 7.1 (2002). In *Loard v. Como*, 137 S.W.2d 880, 882 (Tex. Civ. App.—Ft. Worth 1940, writ ref’d), the court said that a special attorney, who was retained by the city council pursuant to a statute that did not prescribe the special attorney’s compensation, was an “employee” because the special attorney lacked the following attributes of an “officer”:

...[he] may be and often is elected by the resident electors; he subscribes the oath of office and is entrusted with the performance of some of the sovereign functions of government; is subject to removal for failure to so perform the duty or for misconduct or malfeasance in office; his election or appointment is for a definite period of time and his services thereby become continuing and permanent rather than temporary and transitory, as is the case of an employee under a contract.

The *Loard* court noted that the statute authorizing a city council to confer the powers and duties of the City Attorney on others “is not made mandatory by the statute, but is directory in that the article, in that respect, reads: ‘. . . the powers and duties herein prescribed for such officers may be conferred by the council upon other officers.’” 137 S.W.2d at 881 [*emphasis added*].

The most recent Texas Supreme Court case to address the issue held that a tax assessor appointed by a school board of trustees was not a public officer, but merely an agent or employee of the school board. Because the law authorizing the appointment of a tax assessor did not fix a statutory term of office, did not require that the tax assessor execute an official oath and bond, and did not prescribe statutory qualifications, the tax assessor could not exercise any sovereign function of government “largely independent from the control of others.” *Aldine Independent School District v. L.B. Standley*, 154 Tex. 547, 554, 280 S.W.2d 578, 582 (Tex. 1955). The *Aldine* court relied on an opinion that a county road engineer was not a county officer, but a “member of the administrative personnel of the County Road Department,” even though the statute authorizing the creation of the position required that a road engineer be a “licensed professional engineer, experienced in road construction and maintenance,” meet State Highway Department requirements, and provided for an annual “salary not to exceed \$7,200 per year, the exact amount to be determined by the Commissioners Court.” *Dunbar v. Brazoria County*, 224 S.W.2d 738 (Tex. Civ. App.—Galveston 1949, writ ref’d). One court of appeals has since relied on the *Aldine* and *Dunbar* opinions in determining that the statute creating the position of chief juvenile probation officer of Harris County did not create a “public office within the meaning of the Texas Constitution,” because although the law conferred the authority for him to perform certain sovereign functions, it did not permit him to exercise them “largely independent of the control of” the juvenile board. See *Harris County v. Schoenbacher*, 594 S.W.2d 106 (Tex.Civ.App.-Houston [1st Dist.] 1979, writ refused n.r.e).

The Attorney General relied on the *Aldine* opinion in overruling two earlier opinions and determining that a peace officer commissioned by the Texas Department of Public Safety is

not an “appointed officer.” See Op. Tex. Att’y Gen. No. GA-0365 (2005). That opinion noted that the *Aldine* test had been relied upon in two then-recent cases: *Prieto Bail Bonds v. Tex.*, 994 S.W.2d 316 (Tex. App.—El Paso 1999, pet. ref’d) (determining a senior judge was an appointed officer), and *Alvarez v. Tex. Dep’t of Protective & Regulator Svcs.*, No. 03-02-00008-CV, 2002 WL 31599225 at 1 (Tex. App.—Austin 2002) (not designated for publication) (determining child welfare caseworkers were public employees, not officers).

Based on a review of the authorities discussed above, the Chief Medical Examiner of Harris County lacks many of the characteristics of an appointed “officer” required to take an oath and subscribe a statement pursuant to article 16, section 1 of the Texas Constitution, including the following:

- (1) The Medical Examiner does not hold an office created by the Constitution, as do district, county and appellate judges, justices of the peace, district and county attorneys, sheriffs, and constables. See *Howell v. State*, supra.
- (2) The statutory duties of a medical examiner, *i.e.*, autopsy examinations, x-rays and examination of the internal organs and structures after dissection “to determine the cause of death or the nature of any pathological changes that may have contributed to the death,” are medical and scientific procedures that do not require the exercise of the sovereign functions of government. See TEX. CRIM. PROC. CODE ANN. art. 49.01; *Garcia v. State*, 868 S.W.2d 337 (Tex.Crim.App. 1993).
- (3) The creation of the position of Medical Examiner by Commissioners Court is discretionary, not mandatory, pursuant to article 49.25, section 1, of the Texas Code of Criminal Procedure. The statute states that a Commissioners Court “shall establish and maintain the office of medical examiner” in “any county having a population of more than one million and not having a reputable medical school as defined by Articles 4501 and 4503, Revised Civil Statutes of Texas,” while the commissioners court of any county “may establish and provide for the maintenance of the office of medical examiner.” TEX. CRIM. PROC. CODE ANN. art. 49.25 (Vernon 2006) [*emphasis added*]. Harris County has two reputable medical schools: Baylor College of Medicine, and University of Texas Medical School at Houston. Therefore, the decision of Commissioners Court to establish an office of medical examiner was discretionary and not required by statute. See *Loard v. Como*, supra.
- (4) The Medical Examiner is not appointed for a fixed term of years, but rather the Medical Examiner is appointed and “shall serve at the pleasure of the commissioners court.” TEX. CRIM. PROC. CODE ANN. art. 49.25, § 2 (Vernon 2006).

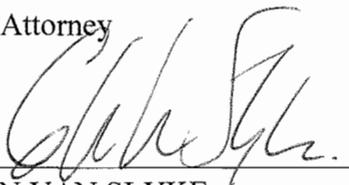
- (5) Article 49.25, section 2 of the Texas Code of Criminal Procedure mentions no mandatory qualifications (*e.g.*, county residence) other than a Texas physician license and suggests that a medical examiner be a person with training and experience in pathology, toxicology, histology, and other medico-legal sciences “to the greatest extent possible.” TEX. CRIM. PROC. CODE ANN. art. 49.25, § 2 (Vernon 2006).
- (6) Article 49.25, section 2 of the Texas Code of Criminal Procedure does not require a full-time permanent-position physician, but only that the physician who Commissioners Court appoints “shall devote so much of his time and energy as is necessary in the performance of the duties conferred by this article.” TEX. CRIM. PROC. CODE ANN. art. 49.25, § 2 (Vernon 2006).
- (7) Article 49.25, section 3 of the Texas Code of Criminal Procedure does not permit a medical examiner the discretion to independently employ deputy examiners, scientific experts, trained technicians, officers, or employees. Rather, such decisions are “subject to the approval of the commissioners court.” TEX. CRIM. PROC. CODE ANN. art. 49.25, § 3 (Vernon 2006).
- (8) Article 49.25, section 3 of the Texas Code of Criminal Procedure does not fix a salary for the medical examiner. “. . . the commissioners court shall establish and pay the salaries.” TEX. CRIM. PROC. CODE ANN. art. 49.25, § 3 (Vernon 2006).
- (9) Article 49.25 of the Texas Code of Criminal Procedure does not specifically require a medical examiner to take an oath of office or to file an official bond, as do many statutes describing the powers and duties of county officers. *Cf.* TEX. LOC. GOV’T CODE ANN. § 82.001 (Vernon 2008) (county clerk); TEX. LOC. GOV’T CODE ANN. § 82.002 (Vernon 2008) (county treasurer); TEX. LOC. GOV’T CODE ANN. § 84.007 (Vernon 2008) (county auditor); TEX. LOC. GOV’T CODE ANN. §§ 85.001 – 85.003 (Vernon 2008) (sheriff, deputy sheriffs, and reserve deputy sheriffs); and TEX. LOC. GOV’T CODE ANN. §§ 86.002, 86.011, 86.012 (Vernon 2008) (constable, deputy constables, and reserve deputy constables).

Summary

Because the position of Chief Medical Examiner of Harris County lacks the determining characteristics of a public “officer” cited in relevant Texas judicial decisions, the Medical Examiner is not an appointed “officer” as that term is intended in article 16, section 1 of the Texas Constitution. Rather, the Medical Examiner is an administrative employee who serves at the pleasure of, and subject to the governmental control of Commissioners Court in such basic discretionary functions as employing and establishing the salaries of deputy medical examiners, scientific and technical officers, and employees. Therefore, the Chief Medical Examiner is not required to take the oath of office or subscribe to the written statement set forth in article 16, section 1 of the Texas Constitution.

Respectfully yours,

VINCE RYAN  
County Attorney

By:   
GLEN VAN SLYKE  
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Approved:

  
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VINCE RYAN  
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