

Office of the Attorney General State of Texas

DAN MORALES

November 6, 1996

Letter Opinion No. 96-124

The Honorable Judith Zaffirini Chair, Committee on Health and Human Services Texas State Senate P.O. Box 12068 Austin, Texas 78711

Re: Whether the State may enter into a contingent fee contract with a private law firm for the provision of legal services involved in a particular lawsuit (ID# 39014)

Dear Senator Zaffirini:

You request our opinion regarding the authority of the State to enter into a contingent fee contract with a private law firm for the provision of legal services involving particular litigation.

In the situation you present, several major oil companies allegedly underpaid the State oil royalties owed to it on land, leased to the oil companies, in which the State had retained royalty interests. This office found that the allegations had merit, and decided to file suit at the specific request of the Commissioner of the General Land Office. Because of the complex nature of the proposed litigation seeking recovery of the royalty underpayments, the commissioner asked this office to authorize his office to enter into a contract with outside counsel, a request that we approved. Because of the considerable costs that the State estimated it would incur in pursuing such a suit, the commissioner urged that the contract be structured in such a way that the contracting law firm agree to pay all necessary and proper expenses incurred in the litigation and to be reimbursed for those expenses only in the event that the State prevails in the matter.

You first ask about the authority of the State to enter into contracts for the services of outside counsel whereby the law firm agrees to pay all necessary and proper expenses incurred in a particular lawsuit and to be compensated, not on the basis of hourly fee billings, but on the basis of a percentage of the moneys recovered; the contract provides that fees will be awarded by the court, either to be paid directly by the defendants or to be paid out of the "common-fund recovery" by the class of plaintiffs. Under the contract at issue, fees will be paid and costs reimbursed only in the event that the State is the prevailing party in the suit.

In order to answer this question, we first examine the separation of powers doctrine articulated in article II, section I of the Texas Constitution, which states as follows:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those

which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

In Texas, the executive power is shared among five officeholders: the governor, the lieutenant governor, the secretary of state, the Comptroller of Public Accounts, the Commissioner of the General Land Office, and the attorney general. Tex. Const. art. IV, section 1. The interpretive commentary to this section explains:

Texas, like every other state, has created a separate executive department in keeping with the doctrine of separation of powers, but unlike some states, the executive department established is decentralized in that there is a diffusion of executive authority within the executive department itself. The governor, to be sure, is the chief executive officer, but executive authority is distributed by constitutional mandate among [five] other officers, all but one of which are elected by popular vote. Furthermore, they are largely independent of the governor in the exercise of their powers.

The Texas Constitution designates the attorney general to be the chief law enforcement officer of the State, *Brady v. Brooks*, 89 S.W. 1052 (Tex. 1905); *Moore v. Bell*, 66 S.W. 45 (Tex. 1902), whose duty it is to institute suits to enforce and protect public rights, *Agey v. American Liberty Pipe Line Co.*, 172 S.W.2d 972 (Tex. 1943); *Maud v. Terrell*, 200 S.W. 375 (Tex. 1918), and who has the "exclusive right and power under the Constitution and statutes to represent state agencies," *Hill v. Texas Water Quality Bd.*, 568 S.W.2d 738, 741 (Tex. Civ. App.-Austin 1978, writ refd n.r.e.). Section 22 of article IV of the Texas Constitution provides that the attorney general shall "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be party," and has long been construed as reposing in the attorney general exclusive control of all aspects of litigation to which the State is party. /Fn 1/ *Charles Scribner's Sons v. Marrs*, 262 S.W. 722 (Tex. 1924); *Lewright v. Bell*, 63 S.W. 623 (Tex. 1901); *Bullock v. Texas Skating Assn*, 583 S.W.2d 888 (Tex. Civ. App.--Austin 1979, writ ref d n.r.e.) ("In matters of litigation the Attorney General is the officer authorized by law to protect the interests of the State, and even in matters of bringing suit the Attorney General 'must exercise judgment and discretion, which will not be controlled by other authorities.'"); see also *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991) ("The Attorney General, as the chief legal officer of the State, has broad discretionary power in conducting his legal duty and responsibility to represent the State.").

Texas courts have recognized the employment of outside counsel to fall within the attorney general's exclusive authority to represent state agencies, so long as such counsel is subordinated to his authority. *Hill*, 568 S.W.2d at 741 (citing *Maud v. Terrell*, 200 S.W. 375 (Tex. 1918)). Courts have not found such employment to violate section 22 of article IV of the Texas Constitution. *Terrell v. Sparks*, 135 S.W. 519 (Tex. 1911); *State v. Murphy*, 137 S.W. 708 (Tex. Civ. App.--1911, no writ). We find that the authority to employ outside legal counsel in

the discharge and fulfillment of the duties of the attorney general is well within his exclusive authority to control litigation in which the state has an interest, and that the attorney general may authorize a state agency, with his approval, to enter into a contract with a private law firm for the provision of legal services.

The executive authority of the attorney general to make decisions and to control litigation in which the state is an interested party may neither be enlarged nor restricted by the legislature. "Section I of Article H of the Constitution of the State of Texas, Vernon's Ann.Stat., specifically provides that the exercise of executive, legislative and judicial powers is to be vested in separate and independent organs of government. The three departments are coordinate with and independent of each other, and none can enlarge, restrict or destroy the powers of the other. See *Lytle v. Haw*, 75 Tex. 128, 12 S.W. 610 (Texas 1889); *Houston Tap & B.R. Co. v. Randolph*, 24 Tex. 317 (1859)." *City of Nassau Bay v. Nassau Bay Telephone Co.*, 517 S.W.2d 613, 618 (Tex. Civ. App.- Houston [1st Dist.] 1974, writ ref d n.r.e.). Again, because it is the constitutional duty of the attorney general to represent state agencies, the attorney general must approve the employment of outside counsel, and such employment must be subordinate to the attorney general. *Hill*, 568 S.W.2d at 741.

In this instance, the General Land Office seeks to enter into a contingent fee arrangement. Very early on, Texas courts recognized the validity of contingent fee legal services contracts. See, e.g., *Bentinck v. Franklin*, 38 Tex. 458 (1873); *Stewart v. H. & T.C.R. Co.*, 62 Tex. 246 (1884); *McCampbell v. Durst*, 11 S.W. 380 (Tex. 1889); *James v. Tumer*, 14 S.W. 574 (Tex. 1890); *Gulf C. & S.F.-R. Co. v. Scott*, 28 S.W. 457 (Tex. Civ. App.--1894, no writ); *Neeler v. Riviere*, 49 S.W. 697 (Tex. Civ. App.--1899, writ ref d; see also *W.A. Combs, The Contingent Fee Contract*, 28 TEX. B.J. 949 (1965). Consistent with this long-standing legal tradition, the Texas Supreme Court by rule permits Texas attorneys to enter into contingent fee contracts. See *Tex. Disciplinary R. Prof Conduct 1.04*, reprinted in *Gov't Code*, tit. 2, subtit. G--App. (State Bar Rules, art. 10, section 9).

Since there is no question of the general validity of contingent fee arrangements, we find that the authority to enter into contingent fee contracts with outside counsel is well within the discretion of the Office of the Attorney General to approve or negotiate and that such implicit authority may necessarily be inferred from the constitutional authority explicitly conferred. See *Attorney General Opinions WW- 713, WW-633 (1959)*. "The grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted. Where the law commands anything to be done, it authorizes the performance of whatever may be necessary for executing its commands." *Terrell*, 135 S.W. at 519.

Thus, we hold that the General Land Office, with the approval of the attorney general acting under his constitutional power to exercise exclusive control of all litigation in which the state is an interested party, may enter into contracts with private law firms for the provision of legal services. The specific terms of such contracts with private attorneys may take the form of contingent fee arrangements whereby the contracting law firm agrees to pay all necessary and

proper expenses incurred during the course of the litigation and receive reimbursement for such expenses, as well as compensation for services rendered, only in the event that the State prevails.

Your second question is whether, if the State and a private law firm enter into such a contract, all necessary and proper expenditures made by the law firm relating to the litigation would constitute an "officeholder contribution" for purposes of title 15 of the ElectionCode.

You ask about the effect of Texas Ethics Commission Advisory Opinion No. 270. Under the circumstances there described, contributions were solicited for or made to two state legislators who sought to raise money to personally intervene in an action in which the State was a party represented by the attorney general. The opinion held that such amounts must be treated as an "officeholder contribution" for purposes of chapter 251 of the Election Code. Ethics Advisory Opinion No. 270 (1995). You are concerned that any litigation-related expenditures made by the law firm pursuant to the contract must first be contributed to a special purpose political committee, and that all expenditures made must be made by the committee.

Section 251.001(4) of the Election Code defines as "officeholder contribution" a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that:

(A) are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office; and

(B ) are not reimbursable with public money. [Emphasis added].

For two reasons, we conclude that such litigation-related expenditures would not constitute an "officeholder contribution" for purposes of the Election Code.

First, such expenditures could not be held to be "contributions" or "gifts," because the elements of a gift or contribution are absent. A gift or contribution is a voluntary transfer of property by one party to another without consideration. *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1961); *Henneberger v. Sheahan*, 278 S.W.2d 497 (Tex. Civ. App.- Dallas 1955, writ refiled n.r.e.). In order to constitute a "gift," the act of giving must be voluntary and the donor must not receive anything of value for the gift, i.e., there must not be consideration for the gift. *Henneberger*, 278 S.W.2d at 498. Obviously, in this instance, there is a contract supported by consideration. See *Terrell*, 135 S.W. at 521. Additionally, in order to constitute a "gift," there must be an intention on the part of the donor to make a gift. *Powell v. Wiley*, 170 S.W.2d 470 (Tex. 1943). In this instance, there is no donative intent on the part of the law firm making the expenditures. The expenditures are made pursuant to and in furtherance of the provisions of an enforceable contract for the provision of legal services; the expenditures are thus not "gifts" or "contributions."

Second, in the situation you pose, the definitions of "officeholder contribution" and "officeholder expenditure" have not been met. Clearly, all necessary and proper expenses incurred by the law firm with which the State entered into the outside legal counsel contract are, by the very terms of the contract, reimbursable by the State. But, even where the contract did not specifically so provide, or in the absence of any signed contract whatsoever, the law firm would be entitled to be reimbursed by the State for such expenses. See, e.g., *Knebel v. Capital Nat I Bank*, 518 S.W.2d 795 (Tex. 1974); *Haynes v. Rederi A/S Aladdin*, 372 F.2d 345 (5th Cir. 1966), cert. denied, 385 U. S. 1020 (1967).

Texas Ethics Commission Advisory Opinion No. 270 is easily distinguishable from the situation of which you inquire. That opinion involved the solicitation of contributions from members of the public by two state legislators in order that they might pursue personally litigation in which the State was already involved and represented by the attorney general; the commission held that all such contributions must be reported and that any such solicitation must be conducted only by a political committee created pursuant to the Election Code. The opinion is neither controlling nor relevant to a situation involving a contingent fee contract entered into between the State and a private law firm. In the first place, the State's interest will be represented in the contract at issue; in the situation addressed in Ethics Advisory Opinion No. 270, the interests of the individual legislators are represented. In the second place, no contributions will be solicited with respect to the contract at issue. The situation involves simply a contract supported by consideration. Consequently, we conclude that any litigation-related expenditures made pursuant to an outside legal counsel contract do not constitute "officeholder contributions" for purposes of chapter 251 of the Election Code.

Your third question asks whether, if the attorneys who entered into the outside counsel contract expend funds to pay for public information announcements designed to explain to the public the facts surrounding the lawsuit and the legal position taken by the State in the lawsuit, such announcements would constitute "political advertising" for purposes of title 15 of the Election Code. You also ask whether the answer to the question would be different if an elected official appeared in the announcements to present information and explain the State's position in the litigation.

Section 251.001(16) of the Election Code defines "political advertising" to mean

[a] communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that:

(A) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or

(B) appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. [Emphasis added.]

The determination as to whether any specific public service announcement would be "political advertising" involves resolution of issues of fact inappropriate to the opinion process. We can, however, suggest some guidelines in this matter. If, for example, the public service announcement supported or opposed a public officer, the announcement would constitute "political advertising" for purposes of the Election Code. If, on the other hand, the public service announcement merely provided information and explanation about the State's position in the litigation, without expressing support or opposition for a public officer, it would not constitute "political advertising." The mere appearance of a public official, such as the Commissioner of the General Land Office or the Governor, for example, in any such announcement would not determine whether the announcement constituted "political advertising" for purposes of the Election Code; the actual content of the advertisement would determine whether a candidate is "supported" or "opposed" and whether the Election Code governed. As the Ethics Commission noted in Advisory Opinion No. 102,

[t]he critical issue in determining whether an advertisement is "political advertising" is whether it is a communication supporting or opposing a candidate or public officer. Whether a particular communication supports or opposes a candidate or public officer is a fact question.

Ethics Advisory Opinion No. 102 (1992) at 2. Whether the test set out in Advisory Opinion No. 102 is met is, of course, a question of fact. See generally Ethics Advisory Opinion Nos. 211, 183 (1994), 144 (1993), 77, 45 (1992).

We note that the contract about which you inquire does not require the law firm to expend moneys for any public service announcements or any sort of advertising; rather, it provides only that the firm agrees to pay all necessary and proper litigation-related expenses. The contract certainly does not require the law firm to pay for any sort of "political advertising." If the law firm chooses to pay for public service announcements that fall within the definition of "political advertising," it may do so only in conformance with the Election Code; such expenditures would not, however, be reimbursable by the State. Whether the dissemination of certain factual information through the media is a necessary and proper litigation-related expense is a question of fact, which cannot be resolved in the opinion process. And whether such an announcement falls within the definition of "political advertising" is also a question that could be resolved only on inspection of the announcement itself

Your fourth question is whether, if the attorneys with whom the State entered into the outside counsel contract pay for the production and broadcast of the public information announcements, such announcements would violate the bar proscription set forth in rule 3.07 of the Texas Disciplinary Rules of Professional Conduct regarding trial publicity.

Rule 3.07 of the Texas Disciplinary Rules of Professional Conduct imposes ethical constraints on an attorney's right to make extrajudicial statements:

(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

Tex. Disciplinary R. Prof Conduct 3.07. Rule 3.07, however, permits extrajudicial disclosure of certain sorts of information:

(c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;

(4) except when prohibited by law, the identity of the persons involved in the matter;

(5) the scheduling or result of any step in litigation;

(6) a request for assistance in obtaining evidence, and information necessary thereto;

(7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the

likelihood of substantial harm to an individual or to the public interest; and

(8) if a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigation and arresting officers or agencies and the length of the investigation.

Once again, of course, the determination as to whether any specific announcement would violate rule 3.07 is a question of fact, the resolution of which is inappropriate in the opinion process. We can, however, suggest that, if any public service announcement sets forth the sort of information outlined in subsection (c) such as facts that are available in the public record, no violation of rule 3.07 would occur. If, on the other hand, the information disclosed "will have substantial likelihood or materially prejudicing an adjudicatory proceeding," then rule 3.07 would be violated.

## SUMMARY

The State may enter into contingent fee contracts for outside legal counsel that provide that the contracting law firm pay all necessary and proper expenses incurred during the course of the litigation and be compensated on the basis of a percentage of the monies recovered only in the event that the state prevails.

The necessary and proper litigation expenses incurred by the law firm pursuant to the contract do not constitute "officeholder contributions" for purposes of title 15 of the Election Code.

The determination as to whether any specific public service announcement would be "political advertising" would involve the resolution of issues of fact, which is inappropriate in the opinion process. If the public service announcement supported or opposed a public officer, the announcement would constitute "political advertising" for purposes of the Election Code. If, on the other hand, the announcement merely provided information and explanation regarding the State's position in the lawsuit, without expressing support for or opposition to a public officer, it would not constitute "political advertising." The mere presence of a public officer in a public service announcement, without more, cannot constitute "political advertising."

The determination as to whether any specific public service announcement would violate rule 3.07 of the Texas Disciplinary Rules of Professional Conduct is a question of fact, the resolution of which is inappropriate in the opinion process. If any public service announcement set forth the sort of information outlined in subsection (c) of that rule--facts that are available in the public record--no violation of rule 3.07 would occur. If, on the other hand, the information disclosed "will have substantial likelihood of materially prejudicing an adjudicatory proceeding," then rule 3.07 would be violated.

Yours very truly,

Sarah J. Shirley Chair, Opinion Committee

Fn 1: The only exception is certain quo warranto proceedings, which may be initiated either by the attorney general or by a county or district attorney. See Civ. Prac. & Rem. Code section 66.002; see also *Morris and Cummings v. State*, 62 Tex. 728 (1884).