



Office of the Attorney General
State of Texas

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March 22, 1995

Honorable Hugo Berlanga
Chair
Committee on Public Health
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. LO95-022

Re: Whether a member of the legislature is precluded by article XVI, section 40 of the Texas Constitution from working as an independent contractor on a part-time basis for a county government (ID# 31810)

Dear Representative Berlanga:

You ask whether a member of the legislature is precluded by article XVI, section 40 of the Texas Constitution from working as an independent contractor on a part-time basis for a county government. Article XVI, section 40 provides in pertinent part that "[n]o member of the Legislature of this State may hold any other office or position of profit under this State."

In Letter Opinion No. 93-31 (1993), this office concluded that a legislator who performed certain duties for an independent school district as an independent contractor did not hold a "position of profit under this State." *See also* Attorney General Opinions C-307 (1964) (holding that legislator who is independent contractor with conservation district is not officer or employee of district and therefore does not hold position of profit under language in former article XVI, section 33, now found in article XVI, section 40), V-303 (1947) at 5 (independent contractor does not hold position of profit within former article XVI, section 33). We see no basis on which to distinguish that ruling here. Therefore, we conclude that article XVI, section 40 does not preclude a legislator from working as an independent contractor on a part-time basis for a county government.¹ Of course, the determination whether a person actually holds a position as an independent contractor as opposed to an employee involves questions of fact and contract interpretation, and is therefore beyond the purview of the opinion process.²

¹We do not address whether the arrangement between the legislator and the county comports with section 572.051 of the Government Code, which sets forth standards of conduct for state officers and employees, or other statutory conflict of interest provisions, *see generally* Gov't Code ch. 572, subch. C.

²The distinction between an independent contractor and an agent or employee is not always easy to draw. The Texas Supreme Court has laid down the following rule:

The general rule relating to independent contractors rests upon certain recognized tests; although such tests are not necessarily concurrent with each

S U M M A R Y

Article XVI, section 40 of the Texas Constitution, as interpreted by Letter Opinion No. 93-31 (1993), does not preclude a legislator from working as an independent contractor on a part-time basis for a county government.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

(footnote continued)

other, nor is each test in itself controlling. Such tests are: (1) The independent nature of his business; (2) his obligation to furnish necessary tools, supplies, and material to perform the job; (3) his right to control the progress of the work, except as to final results; (4) the time for which he is employed; and (5) the method of payment, whether by time or by the job. There are other tests, but the foregoing are considered the essential tests upon which such rule is based.

Industrial Indemnity Exchange v. Southard, 160 S.W.2d 905, 907 (Tex. 1942).