THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

June 12, 1975

Honorable Royce Adkins
District Attorney
39th Judicial District
Haskell, Texas 79521

Letter Advisory No. 111

Re: Whether a district judge may appoint his grand-nephew or the district probation officer to represent an indigent defendant.

Dear Mr. Adkins:

You have requested our opinion regarding the appointment of an attorney to represent an indigent defendant. You state that the only attorneys who practice within the Judicial District and are available for such appointment are the grandnephew of the District Judge and the District Probation Officer. You ask whether the Judge is prohibited from appointing either of these persons to represent an indigent defendant. We will first consider the Judge's appointment of his grandnephew. The relationship in this case is by consanguinity. The individual is the grandson of the Judge's brother.

The Texas nepotism statute, article 5996a, V. T. C. S., provides as follows:

> No officer of this State nor any officer of any district, county, city, precinct, school district, or other municipal board, or judge of any court, created by or under authority of any General or Special Law of this State, nor any member of the Legislature, shall appoint, or vote for, or confirm the appointment to any office, position, clerkship, employment or duty, of any person related within the second degree by affinity or within the third degree by consanguinity to the person so appointing or so voting, or to any other member of any such board, the Legislature, or court of which such person so appointing or voting may be a member, when the salary, fees, or

> compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office of any kind or character whatsoever; provided, that nothing herein contained, nor in any other nepotism law contained in any charter or ordinance of any municipal corporation of this State, shall prevent the appointment, voting for, or confirmation of any person who shall have been continuously employed in any such office, position, clerkship, employment or duty for a period of two (2) years prior to the election or appointment of the officer or member appointing, voting for, or confirming the appointment, or to the election or appointment of the officer or member related to such employee in the prohibited degree.

We must first determine whether the Judge's grandnephew falls within the third degree of consanguinity.

In Letter Advisory Number 67 (1973), we dealt with the method of computing degrees of kinship. There we quoted from Tyler Tap Railroad Co. and Douglass v. Overton, 1 Texas Court of Appeals 268, § 533 (1878):

> In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of the relationship between the two parties makes a degree, and the rule is the same by the civil and common law. The mode of computing degrees of collateral consanguinity at the common and by the canon law is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree because from the father each one of them is one degree. An uncle and nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor, and the uncle is extended to the remotest degree of collateral relationship.

On the basis of this decision, we must conclude that an individual's grandnephew is related to him within the third degree of consanguinity.

In order to invoke the proscription of article 5996a, appointment must be made to an "office, position, clerkship, employment or duty." Although we have previously held that a court-appointed attorney "does not occupy any civil office within the meaning of article 16, section 40 by reason of such an appointment," Letter Advisory No. 93 (1975), there can be no doubt that a court-appointed attorney performs a "duty" for purposes of article 5996a. "Duty," as used in this statute, appears to have no special or technical meaning, and in such a case should be read according to its ordinary meaning. National Life Co. v. Stegall, 169 S. W. 2d 155 (Tex. Sup. 1943).

Thus, we believe that a district judge would be prohibited from appointing his grandnephew to represent an indigent defendant so long as "the salary, fees, or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds." Article 26.05 of the Code of Criminal Procedure provides, in part:

> Section 1. A counsel appointed to defend a person accused of a felony or a misdemeanor punishable by imprisonment. . . shall be paid from the general fund of the county in which the prosecution was instituted. . .
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> . . . .
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> Section 3. All payments made under the provisions of this Article may be included as costs of court.

Although, as you suggest, an appointed attorney's fee which is taxed as costs of court may be recovered when the defendant is granted probation, we do not believe that this possibility is sufficient to overcome the prohibitive language of article 5996a. In our view, the language of article 26.05 is explicit: it requires that the attorney's fee be paid from the county's general fund. However, any such payment from public funds is expressly prohibited by the nepotism statute. Accordingly, it is our opinion that a district judge may not appoint his grandnephew to represent an indigent defendant if the appointed counsel is to be compensated in any manner from public funds.

You also inquire about the possible appointment of the District Probation Officer to represent an indigent defendant. We have held that such an appointed attorney does not hold a civil office of emolument. Letter Advisory No. 93 (1975). Furthermore, since a probation officer is of the judicial department, there is no separation of powers problem. Letter Advisory No. 65 (1973). We believe, however, that the two positions are in fundamental conflict. The State Bar Committee, in Opinion No. 327 (1966), reported at 23 Baylor L. Rev. 855-56 (1972), dealt with this precise question:

> . . .[W]e believe it is clear that the primary duty of a Probation Officer is to the public. It is equally clear that the primary duty of defense counsel is to the accused and such duty requires him to exert his best efforts in the prisoner's behalf -- Canon 4, to present by all fair and honorable means every defense that the law permits -- Canon 5, and to represent the client with undivided fidelity and not reveal his secrets or confidences -- Canons 6 and 34. Obviously, therefore, the Probation Officer cannot ethically act as defense counsel in any case in which there is or may be an application for probation.
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> Theoretically the Probation Officer would not be disqualified in cases not involving a question of probation but it is unlikely that such cases could be singled out in advance of appointment or employment. Therefore, it is our opinion that the Probation Officer should not act as defense counsel in any felony case within his district.
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> Aside from any ethical disqualification, such representation is discouraged because of potential public misinterpretation.

We fully concur in both the reasoning and result of Opinion No. 327 and believe it would be reached as well under the new Code of Professional Responsibility. As a result, it is our opinion that a district judge should not appoint the district probation officer to represent a defendant in a criminal case.

Very truly yours,

John L. Hill

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Attorney General of Texas

APPROVED:

DAVID M. KENDALL, First Assistant

C. ROBERT HEATH, Chairman
Opinion Committee

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