



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable H. H. Courtney
Sheriff
Motley County
Matador, Texas

Dear Sir:

Opinion No. 0-5120

Re: What procedure should be followed in handling the county attorney's fee in a misdemeanor case, when the county is without a county attorney?
And a related question.

Under the provisions of Article 4399, Vernon's Annotated Civil Statutes, this department is prohibited from rendering legal opinions to a sheriff, but in view of the fact that your county is at present without the services of a county attorney, district attorney, or county auditor, we feel it is not inappropriate to answer your questions. We quote from your letter as follows:

"We appreciate the fact that you only give opinions to County and District Attorneys, but since we do not have a County Attorney, or a District Attorney in this district, we thought you might make an exception and give us an opinion.

"Our County Attorney and District Attorney are both in the Armed Service. We do not have anyone to advise us. We had an Assistant County Attorney but he resigned to accept a place with the G. P. A. We have only one Attorney in Motley County, G. E. Hamilton, and he is too busy to advise us very much and he doesn't have time to look up anything for us. So you see we must have some advice.

"We need to know just how we should handle the County Attorney fee in a misdemeanor case.

Should we collect the fee for the County Attorney when we collect the fine and cost, or should the County Attorney fee be left out? If we collect the fee for the County Attorney, what should we do with it? Should it be turned over to the County Treasurer?

"We would also like to know how the Justice of the Peace can submit his Monthly Account of Fees Due without the County Attorney making his certificate?

"We know what we should do if we had an Assistant County Attorney, but since we do not have either a County Attorney or an Assistant County Attorney we do not know what we should do.

"We will appreciate it very much if you will send us this information at once, or tell us where we can find it in case you can't send us an opinion.

". . . ."

Although it is not stated in your letter, for the purposes of this opinion, we assume that the county attorney did not resign his office before entering into the armed services of this country. If we are correct in this assumption then the commissioners' court neither has the authority to grant a leave of absence to the county attorney to enter the armed forces nor the power to declare his office vacant if he does enter the armed forces. (See our Opinion No. 0-2533, a copy of which is enclosed herewith.)

With reference to the disposition of the fees of the county attorney we think that our Opinion No. 0-4599 answers your inquiry. This opinion holds:

"1. Where the county attorney has taken some action in the case for the State in the justice court he would be entitled to the \$5.00 fee on a plea of guilty in the justice court regardless of whether he was present in the justice court at the time the plea was entered. For example, if your county attorney filed a complaint in justice court before he left to join

the Army he would be entitled to the \$5.00 fee if the defendant subsequently plead guilty.

"2. If the county attorney has not taken any action in such a case and is not present and ready to represent the State at a regular term of the justice court and a defendant pleads guilty at such regular term the county attorney would not be entitled to the fee. Nor would the county be entitled to the fee. If no fee is due the county attorney it would not be charged against the defendant.

"3. If the defendant plead guilty in justice court at any time other than the regular term of such court the county attorney would be entitled to a \$5.00 fee even though he was not present and had taken no action in the case."
(We are also enclosing a copy of this opinion.)

We now consider your second question which is quoted above. Article 1052, Vernon's Annotated Code of Criminal Procedure provides in part:

". . . Provided the Commissioner's Court shall not pay any account or trial fees on any case tried and in which an acquittal is had unless the State of Texas was represented in the trial of said cause by the County Attorney, or his assistant, Criminal District Attorney or his assistant, and the certificate of said Attorney is attached to said account certifying to the fact that said cause was tried, and the State of Texas was represented, and that in his judgment there was sufficient evidence in said cause to demand a trial of same."

It is our opinion that in the cases of acquittal, before the justice of the peace is entitled to his fee, the county attorney, or his assistant, would have to certify to the facts as required by said Article 1052.

Article 31, Vernon's Annotated Code of Criminal Procedure, provides:

"Whenever any district or county attorney fails to attend any term of the district, county

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or justice's court, the judge of said court or such justice may appoint some competent attorney to perform the duties of such district or county attorney, who shall be allowed the same compensation for his services as is allowed the district attorney or county attorney. Said appointment shall not extend beyond the term of the court at which it is made, and shall be vacated upon the appearance of the district or county attorney."

It is our further opinion that if the justice of the peace appoints an attorney pro tem under the provisions of this Article the attorney pro tem could make the certificates as required by Article 1052. An attorney pro tem appointed by the court has all the powers and duties of the regular prosecuting attorney. State v. Lackey, 35 Tex. 357.

Therefore, in the absence of the certificate required by Article 1052, in cases of acquittal, the justice of the peace would not be entitled to his fee.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By /s/

Ardell Williams
Assistant

AW:db

Enclosure

APPROVED MAR 13, 1943
/s/ Wm. J. Fanning
ACTING ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
COMMITTEE
BY BWE
CHAIRMAN

AW:gm