



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Hon. G. Earl Hutchings
County Auditor, Young County
Graham, Texas

Dear Sir:

Opinion No. O-6100
Re: Whether the 10%
commission allowed
by Sec. 5 of Art.
3196A, V.A.C.S., is
accountable as a
fee of office, or
a fee that can be
retained by the
county attorney.

Your letter of July 5, 1944, requesting the opinion
of this department on the questions stated therein is as
follows:

"Art. 3196A, Sec. 5, of the Revised Statutes,
1925, as amended, provides that the State Board of
Control may request the county or district attorney
to represent the State in filing a claim in probate
court and provides that said county or district
attorney shall receive ten percent commission on the
amount collected. It also provides that the county
or district attorney may refuse to act, in other words,
it does not make it mandatory that they shall act in
the case.

"Is this ten per cent collected as commissions
by the county attorney accountable as fees of office
or individual fee?"

Section 5, of Article 3196A, V.A.C.S., provides:

"Upon the written request of the State Board
of Control, the county or district attorney or in
case of the refusal or inability of both to act, the
Attorney General, shall represent the State in fil-
ing a claim in probate court or a petition in a
court of competent jurisdiction, wherein the guardian
of such patient and/or other person legally liable

for his support, may be cited to appear then and there to show cause why the State should not have judgment against him or them for the amount due it for the support, maintenance and treatment of such patient; and, upon sufficient showing, judgment may be entered against such guardian or other persons for the amount found to be due the State, which judgment may be enforced as in other cases. A verified account, sworn to by the superintendent of the respective hospitals or psychopathic hospitals wherein such patient is being treated or has been treated, as to the amount due shall be sufficient evidence to authorize the court to render judgment therein. The county or district attorney representing the State shall be entitled to a commission of ten (10%) per cent of the amount collected. All monies so collected, less such commission, shall be, by the said attorney, paid to the State Board of Control, which shall receive and receipt for the same and shall issue the same for the maintenance and improvement of said institution or institutions in which said patients shall have been confined."

The foregoing statute authorizes the State Board of Control to request the county or district attorney in writing to represent the State in filing a claim in probate court or a petition in a court of competent jurisdiction wherein the guardian of a patient and/or other person is legally liable for his support. This statute allows the county or district attorney representing the State a 10% commission of the amount collected. Generally speaking, a fee or any compensation paid a public officer for the performances of a duty enjoined by statute is a fee or compensation collected in an official capacity. (See the case of Nueces County vs. Carrington, et al, 162 S. W. 2d, 687, and the authorities cited therein.)

Article 3891, V. A. C. S., reads, in part, as follows:

"....The compensations, limitations and maximums herein fixed in this act for officers shall include and apply to all officers mentioned herein and each and every county of this State, and it is hereby declared to be the intention of the Legislature that the provisions of this Act shall apply to each of said officers, and any special or general law inconsistent with the provisions hereof is hereby expressly repealed insofar as the same may be inconsistent with this Act."

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"The compensation, limitations and maximums herein fixed shall also apply to all fees and compensations whatsoever collected by said officers in their official capacity, whether accountable as fees of office under the present law, and any law, general or special, to the contrary, is hereby expressly repealed. The only kind and character of compensation exempt from the provisions of this Act shall be rewards received by sheriffs for apprehension of criminals or fugitives from justice and for the recovery of stolen property and monies received by county judges and justices of the peace for performing marriage ceremonies, which sum shall not be accountable for and not required to be reported as fees of office."

Young County has a population of 19,004 inhabitants, according to the 1940 Federal Census and we are informed by the Comptroller's office that the commissioners' court of Young County has determined that the county officers in such county shall be compensated for their services by the payment of an annual salary. Your attention is directed to Sections 3, 4 and 5, of Article 3912e, V.A.C.S., and it will be noted that Sec. 5, of Art. 3912e, supra, makes it the duty of all officers to charge and collect in the manner authorized by law all fees and commissions which are permitted by law to be assessed and collected for all official services performed by them. And when such fees are collected, they shall be deposited in the officers' salary fund or funds provided in the act.

The Supreme Court of Texas, in the case of Nichols, et al, vs. Galveston County, 228, S. W. 547, quoting from the case of Ward vs. Harrison County, 209 S. W. 793, said:

"We cannot agree with appellants in their contention that the commissions received by the county judge for the sale of Harris county drainage district bonds are not included in the term 'fees of all kinds' as that term is used in Article 3881, Vernon's Sayles' Civil Statutes, fixing the maximum compensation allowed county officers. On the contrary, we think the decisions of our Supreme Court and Courts of Civil Appeals settle this question adversely to appellants' contention. The general purpose of the maximum fee bill was to limit the compensation received by the officers named therein

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for the performance of their official duties, and the term 'fees of all kinds' as used in that act, has been expressly held to include commissions allowed by law for the performance of official duty, the commission so allowed not being excepted from the maximum fee bill by any provisions of the statute." (Also see the case of Taylor, et al, vs. Brewster County, 144 S. W. 314.)

In view of the foregoing authorities, you are respectfully advised that it is the opinion of this department that the 10% collected as commission by the county attorney under Sec. 5, of Art. 3168A is accountable as a fee of office and must be paid into the officers' salary fund. Stated differently, the county attorney is not legally authorized to personally retain this commission.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*

Ardell Williams
Assistant

AW:rt

G. P. Blackburn

