



ID#12259  
MT

STEVE W. SIMMONS  
**DISTRICT ATTORNEY**  
THIRTY FOURTH JUDICIAL DISTRICT  
EL PASO, CULBERSON AND HUDSPETH COUNTIES  
303 CITY COUNTY BUILDING  
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APR 22 91

Opinion Committee

RQ-76

April 18, 1991

The Honorable Daniel Morales  
Attorney General of the State of Texas  
Supreme Court Building  
P.O. Box 12548  
Austin, Texas 78711-2548

Dear Attorney General Morales:

Enclosed please find an application or request for an opinion from you regarding the utilization of funds derived from settlements in a civil suit.

This matter is of importance to us. May this office receive an opinion from you as soon as may be possible.

Sincerely,

Mr. Steve W. Simmons  
34TH Judicial District Attorney

SWS:jcs

ACCOMPANIED BY ENCLOSURES -  
FILED SEPARATELY

April 18, 1991

The Honorable Daniel Morales  
Attorney General of the State of Texas  
Supreme Court Building  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Requested for an opinion regarding the question of whether or not the State Treasurer can authorize the 34th Judicial District Attorney to retain the sum of \$22,540.00 from settlements with defendants for reimbursement of costs expended in a civil suit to collect misappropriated escheated funds.

Dear Attorney General Morales:

I respectfully submit the following question for your opinion:

QUESTION PRESENTED

Can the state reimburse the El Paso County District Attorney for expert witness expenses incurred in connection with escheat proceedings? Can the El Paso County District Attorney petition the comptroller directly for payment of expert witness fees once the El Paso County District Attorney has paid the expert witness and the expert witness has assigned his or her fee to the District Attorney? May the State Treasurer authorize the 34th Judicial District Attorney to reimburse himself from settlement proceeds in a civil suit filed in behalf of the State Treasurer, said funds to be held in escrow until drawn down, as a method of cost reimbursement?

STATEMENT OF FACTS

A scheme was uncovered in El Paso, Texas wherein a County Court at law Judge, three attorneys and an undertaker zeroed out the property of estates that would have escheated to the State of Texas. Both the State Treasurer and the 34th Judicial District Attorney conducted investigations and found that the Criminal and Civil laws of the State of Texas had been violated. Indictments were voted by a grand jury on the Criminal law violations. The sums misappropriated exceeded \$288,000.00. The State Treasurer requested that the 34th Judicial District Attorney file a Civil suit against the persons involved in the scheme to collect the funds due the State of Texas as escheated monies or property. The escheat provisions authorize either a District Attorney or the Attorney General to file such suits. A letter from the 34th Judicial District Attorney was sent to the Attorney General requesting the Attorney General to make an election as to whether or not the Attorney General desired to pursue the Civil actions. On August 6, 1990 Mr. H. Clyde Farrell of the Attorney General's office wrote the 34th Judicial District Attorney declining to pursue the matter and referring the matter for suit to the 34th Judicial District Attorney. In the course of pursuing the Civil matter the 34th Judicial District Attorney has already expended the sum of \$12,540.00 in expert witness fees and anticipates expending another \$10,000.00 in expert witness fees for trial testimony. These funds are not budgeted for in the annual budget of the District Attorney and

create a problem in overall budget expenditure terms. The 34th Judicial District Attorney both orally and in writing has requested that the State Treasurer reimburse the 34th Judicial District Attorney the costs expended in pursuing these actions in behalf of the State Treasurer. The 34th Judicial District Attorney requested reimbursement from the "Abandoned Property Fund" controlled by the State Treasurer. The State Treasurer has responded that no appropriation from the "Fund" was made in fiscal 1990-1991 for reimbursement from the "Fund" and suggested instead that in the event some or all of the defendants settle that the 34th Judicial District Attorney place in an escrow account the sum of \$22,540.00 and reimburse itself from the escrow account on an expended and draw down basis. The other proceeds of settlement, if any, would be forwarded to the State Treasurer for appropriate distribution. While this method of cost reimbursement seems reasonable it may be illegal.

#### LEGAL RESEARCH

In my opinion, state law clearly prohibits the system for reimbursement of expert witness expenses as suggested by the State Treasurer.

The Government Code is explicit in the procedures for disposition of state funds:

#### Section 41.005. Collection of Money

- (a) Not later than the 30th day after the date on which a district or county attorney receives any money collected for the state or a county, the district or county attorney shall, after deducting the commissions provided by this section, pay the money into the treasury of the state or of the county to which it belongs.
- (b) The district or county attorney may retain a commission from money collected for the state or a county. The amount of the commission in any one case is 10 percent of the first \$1,000 collected, and five percent of the amount collected over \$1,000.
- (c) Subsections (a) and (b) of this section also apply to money realized for the state under the laws governing escheat.
- (d) Not later than the last day of August of each year, each district and county attorney shall file in the office of the comptroller or of the county treasurer, as the case may be, a sworn account of all money received by him by virtue of his office during the preceding year and payable into the state or county treasury.

In accordance with Article XVI, Section 61 of the Texas Constitution, the district attorney's commission on money collected for the state should properly be deposited in the salary fund for the District Attorney's Office of the county treasury. Opinion of the Attorney General No. 0-5306 (1943).

Subchapter E. Claims, of Chapter 403 of the Government Code creates duties of the state comptroller and attorney general to audit and verify claims on state funds. Clearly, the Subchapter E provisions are intended to provide safeguards to protect the state from paying unsubstantiated or unreasonable claims. These safeguards would be subverted by the proposed plan for reimbursement of expert witness fees. For this reason, and because section 41.005 allows only thirty days before collected monies must be paid into the state treasury, I believe that the plan proposed by the State Treasurer is unworkable and probably illegal.

In the opinion V-1071 (1950), the attorney general states that probate proceedings are civil cases. As such, the rules for payment of criminal witness fees set forth in the Texas Code of Criminal Procedure, Article 35.27 (Vernon's 1989) are inapplicable. Recovery of expert witness fees, if allowable at all, is addressed in the Property Code Chapter 74.

Statutory authorization is unclear for the payment of expert witnesses in an escheat proceeding. Until 1985, express statutory authorization existed for payment of escheat suit witnesses in subsection (b) of section 72.603 of the Texas Property Code (Vernon's 1984). When section 72.603 was repealed, section 74.602 was seemingly substituted. See Vernon's Texas Codes Annotated, Vol. 3, Property Code pocket part 1991. In enacting section 74.602 of the property code, the Texas Legislature omitted the language specifying "witness fees" as a permitted use of state treasury funds. The legislature expanded the overall scope of potential uses of state funds however, by including in subsection (c) of section 74.602 language that permits expenditures for "employment of necessary personnel, and any other necessary expenses."

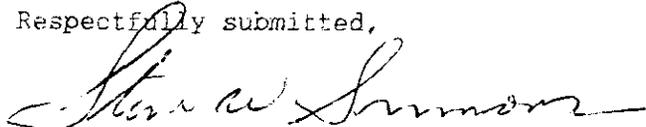
In the opinion S-89 (1953) the attorney general acknowledges that the comptroller is authorized to issue a warrant to a county to pay a witness certificate that has been properly assigned to such county. Attorney general opinion WW-578 (1959) states that Railroad Commission appropriations are properly expended for the purpose of compensating experts contracted to assist the Railroad Commission in evaluating testimony adduced at hearings before the Railroad Commission and thereby assist the Railroad Commission to carry out its duty. It is a public duty of a district attorney to locate and recover revenue and property to which the state is entitled. Property Code chapters 71-75. In the spirit of WW-578 (1959) expert witness expenses incurred by the El Paso County District Attorney in pursuit of misappropriated state funds should be directly re-compensable from the state comptroller under a procedure substantially similar to the procedure of advance and assignment of state funds to pay witnesses authorized by T.C.C.P Art. 35.27.

The most reasonable interpretation of section 74.602 in proper contrast to section 72.603 (repealed) would indicate that the legislature intended to include expert witness fees as a reimbursable expense associated with escheat proceedings. Any contrary interpretation would paradoxically hobble the state's attorney by denying him or her the crucial assistance of an expert while otherwise allowing the employment of other useful personnel such as investigators or paralegals.

SUMMARY

Are witness fees paid to experts who testify for the State at escheat proceedings reimbursable under Section 74.602 of the Property Code? If so, what is the proper procedure?

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Steve W. Simmons".

Steve W. Simmons  
El Paso County,  
District Attorney