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Honorable Greg Abbott
Texas Attorney General
Post Office Box 12548
Austin, Texas 78711-2548



*The Senate of
The State of Texas*

October 15, 2008

RECEIVED

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OPINION COMMITTEE

RQ-0752-GA

**PRESIDENT PRO TEM
OF THE TEXAS SENATE
2004 - 2005**

COMMITTEES

Jurisprudence, Chairman
Administration
Intergovernmental Relations
Transportation and Homeland Security

**COUNTIES IN
SENATE DISTRICT 25**

Bexar (north)	Hays
Comal	Kendall
Guadalupe	Travis (south)

FILE # ML-45859-08
I.D. # 45859

Re: Contract under article 103.0031 of the Texas Code of Criminal Procedure

Dear General Abbott:

During the 2001 and 2003 legislative sessions, the Senate Jurisprudence Committee considered and approved legislation aimed at improving the collection of delinquent fines, fees and court costs arising from cases before the municipal, justice, county and district courts of this State. These bills, S.B. 1778 and S.B. 782, respectively, enhanced the ability of cities and counties to use private firms to assist in collecting millions of dollars of delinquent fines, fees and court costs due around the state. Both bills passed the Legislature with overwhelming majorities and were signed by the Governor.

In 2005, through the adoption of S.B. 1863, the Legislature further signaled the importance of effective programs aimed at the collection of these delinquent amounts by requiring large cities and counties to take specific steps to improve collection of delinquent amounts, including the use of private firms in appropriate circumstances. The bill applies to counties with a population of 50,000 or greater and cities with a population of 100,000 or greater.

Increased focus on the collection of delinquent cases is producing results. According to the Office of Court Administration, state revenue increased by \$5.9 million for the period of April 1, 2006, through March 31, 2007, as a direct result of the collection improvements mandated by S.B. 1863.¹



I am advised that most of the cities and counties covered by S.B. 1863 have retained private firms to assist in the collection of delinquent fines, fees and court costs arising from criminal cases. Recently, after determining that more than \$15 million of fines, fees and court costs were delinquent, the Hidalgo County Commissioners Court awarded a collections contract to a private law firm. Under this contract, the law firm will provide legal advice to the County regarding implementation of an expanded collections program and, on the County's behalf, will initiate contact with persons who owe court costs, fines or fees to the County that are more than 60 days past due according to the County's records. The law firm's contacts with defendants will consist solely of letters and telephone calls. Some of the people contacted will have had a final judgment against them for these amounts, while others will have charges pending against them without a final adjudication. See TEX. CODE CRIM. PROC. art. 103.0031(a)(2) (providing for collection of amounts due "in cases in which the accused has failed to appear"). The letters and phone calls will urge defendants to pay the amounts due per the county's records and advise them of the potential consequences of nonpayment. In accordance with the statute, the letters also advise defendants in failure to appear cases of their right to enter a plea or go to trial on any offense charged. Tex. Code Crim. Proc. art. 103.0031(j). Sample copies of the letters are attached. The collection firm will not file any documents in the criminal cases.

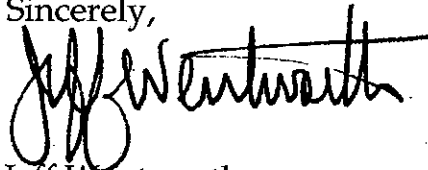
Hidalgo County's criminal cases are prosecuted by the county's criminal district attorney. See TEX. GOV'T CODE § 44.208(b) (conferring upon the Hidalgo County criminal district attorney all "the powers, duties, and privileges in Hidalgo County that are conferred by law on county and district attorneys"). The criminal district attorney has taken the position that the execution and performance of this contract impermissibly interferes with his prosecutorial authority with respect to these criminal cases. He has expressed his belief that article 103.0031 is unconstitutional, and has directed the county clerk and county auditor not to proceed with implementation of the contract with the private law firm for the collection of delinquent accounts.

This issue has important ramifications across the state. As I mentioned earlier, there are many contracts in place between cities and counties for the collection of these delinquent amounts, and they are generating millions of dollars of revenue for state and local government each year. If these contracts rest on legally infirm ground, the Legislature may need to take remedial action.

I request your opinion on whether Hidalgo County's execution and performance of a contract with a private firm for the collection of delinquent fines, fees and court costs arising from its justice, county and district courts interferes with or in any way abrogates the authority of the Hidalgo County criminal district attorney with respect to either the pending or adjudicated criminal cases referred to the private firm for collections assistance. Enclosed with this request is a memorandum from counsel for Hidalgo County on these issues.

Thank you for your attention to this matter. Should you need additional information, please contact either me or my general counsel, Katie Henry.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Wentworth". The signature is written in a cursive style with a prominent loop at the end of the last name.

Jeff Wentworth

¹ Office of Court Administration, *CourTex Texas Judicial Branch News, Special Edition – Collection Program*, (August 2007); this report can be found at <http://www.courts.state.tx.us/pubs/courtex/collections-edition-2007.pdf>.

MEMORANDUM

TO: INTERESTED PARTIES
FROM: RAY BONILLA AND DOUG RAY
DATE: SEPTEMBER 23, 2008
RE: COLLECTIONS CONTRACTS UNDER TEX. CODE OF CRIM.
PROCEDURE ARTICLE 103.0031

The Hidalgo County District Attorney contends that the execution and performance of a contract for the collection of criminal fines and fees, entered into between the County and a private law firm, is void because it interferes with his right to represent the State in criminal proceedings. Because nothing in the agreement or the statute upon which it is based interferes with the District Attorney's performance of his duties, the contract is a valid exercise of the County's legal authority.

A. *Rights and Duties of the Criminal District Attorney*

"The office of District Attorney, including that of criminal district attorney, is a constitutional office, the duties . . . of which are provided for in Article V, Section 21, of the Constitution." *Hill County v. Sheppard*, 142 Tex. 358, 142 Tex. 358.62, 178 S.W.2d 261, 263 (1944). The Hidalgo County "criminal district attorney has all the powers, duties, and privileges in Hidalgo County that are conferred by law on county and district attorneys." TEX. GOV'T CODE § 44.208(b). As such, the District Attorney has the right and duty to represent the State in all criminal prosecutions in district, county and justice courts. See TEX. CODE. CRIM. PROC. art. 2.01 (providing that the district attorney shall represent the state in all district court criminal prosecutions); *id.* art. 2.02 (providing that

county attorney shall represent the state in criminal prosecutions in all courts below the grade of district court).

“[W]hen acting in the prosecutorial capacity to enforce state penal law, a district attorney is an agent of the state, not of the county in which the criminal case happens to be prosecuted.” *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997). As the State’s attorney in criminal proceedings, the District Attorney has the duty to “see that justice is done.” TEX. CODE CRIM. PROC. art. 2.01. In the performance of this duty, he has the right to “control . . . crucial prosecutorial decisions, including, but not limited to, decisions regarding whether to prosecute, what investigative powers to utilize, and what plea bargains to strike.” *Hartsfield v. State*, 200 S.W.3d 813, 817 (Tex. App. – Texarkana 2006, pet. ref’d). If a criminal defendant has been given community supervision, then it is within the discretion of the District Attorney to seek revocation of that supervision. OP. TEX. ATT’Y GEN. No. JM-194 at 6, 8 (1984).

Once a court has issued a final judgment for a fine or fee, however, it is no longer the duty of the District Attorney to enforce such amounts, although he has the right to collect these funds. See TEX. CODE CRIM. PROC. art. 103.003(a). Rather, the Code of Criminal Procedure places the active responsibility for enforcing criminal fines and fees upon the courts assessing the fines and the sheriff called upon to execute the writs issued by these courts. Thus, both justice and county courts may issue warrants for the arrest of defendants who fail to pay their fines and may also issue writs to execute upon any property of delinquent defendants. See *id.* arts. 43.05-.07; 45.045-.047; see also OP. TEX. ATT’Y GEN. No. WW-1326 at 5 (1962) (“[T]he sheriff is charged with the collection

of fines assessed in the county court.”); OP. TEX. ATT’Y GEN. No. DM-396 at 8 (1996) (justice of the peace has duty to collect fines in criminal judgments entered by the justice). Once the court issues a writ to execute on a defendant’s property, it becomes the responsibility of the sheriff to collect upon such judgment and account to the commissioner’s court for any failure to do so. *See* TEX. LOC. GOV’T CODE § 112.051.

B. Interests of the County in Fines and Fees

All criminal fines and fees assessed by the courts in criminal prosecutions are in the name of the State. TEX. CODE CRIM. PROC. arts. 1.23; 42.01, § 1; 45.041(a). However, the fines and fees collected under such criminal judgments are owed and payable to the county in which the judgment is rendered. *See Orange County v. Ware*, 819 S.W.2d 472, 474-75 (Tex. 1991) (holding that amounts owed by a defendant pursuant to a judgment obtained in the name of the State under the Code of Criminal Procedure is money that is actually owed to the county). As such, the County has a pecuniary interest in all fines and costs assessed against criminal defendants in its courts.

C. Private Collection Contracts

In recognition of counties’ interest in criminal fines and fees, the Legislature has provided that they may enter into agreements with private firms for the collection of these monies. *See* TEX. CODE CRIM. PROC. art. 103.0031. Under this statute, a county can enter into a contract for the collection of fines, fees and costs that have been assessed in a criminal judgment, as well as such amounts that would be acceptable under the court’s standard policy in a case in which the accused has failed to appear as required.

See *id.* art. 103.0031(a)(1)-(2), (b)(1). Hidalgo County has entered into such a contract with a private law firm.

Under this agreement, the law firm contacts criminal defendants by letter and phone, seeking to persuade them to pay the amounts that have either been adjudicated or proposed for the resolution of the pending criminal complaint. In none of these communications does the law firm purport to control the actions of either the courts or the District Attorney. Rather, the purpose of the contract and the communications thereunder is simply to persuade persons owing sums to the county to pay those monies. Of course, for those defendants who have not yet entered a plea or gone to trial, any communications would inform them of that right. *Id.* art. 103.0031(j).

D. *Private Collection Firms do not Interfere with the District Attorney's Rights and Duties*

As a general matter, "the Legislature may not remove or abridge a district or county attorney's exclusive prosecutorial function, unless authorized by an express constitutional provision." *Meshell v. State*, 739 S.W.2d 246, 254-55 (Tex. Crim. App. 1987). "The test . . . to be used in determining the validity of [article 103.0031] is simply whether by plain and unambiguous language it deprives the [district attorneys] of their authority to prosecute [criminal complaints] in the courts [on behalf of] the State." *Maud v. Terrell*, 109 Tex. 97, 100, 200 S.W. 375, 376 (1918). It is clear that article 103.0031 does not run afoul of this prohibition. The statute provides for private entities to represent the County, not the State, with respect to the non-judicial collection of monies owed to the County. This type of contract in no way interferes with or abridges those duties committed exclusively to the District Attorney.

Although the District Attorney has the authority to collect fines and fees, so does the County Clerk. See TEX. CODE CRIM. PROC. art. 103.003(a); OP. TEX. ATT'Y GEN. No. GA-332 at 4 (2005). The mere fact that the County Clerk, or the County's designated agent, sends letters to prompt criminal defendants to pay fines and fees cannot be construed as impinging upon the District Attorney's duties. The Attorney General has opined that collection activities by a private agent for the county do not interfere with or abrogate any rights or remedies a justice of the peace may utilize to collect outstanding fines and fees. See OP. TEX. ATT'Y GEN. No. GA-313 at 5. Likewise, the non-judicial collection activities contemplated by the statute and the collections contract do not interfere with the District Attorney's rights and duties.

For example, in one case the Legislature passed a statute allowing the Comptroller to hire a private entity or individual to assist in the collection of inheritance taxes. *Maud*, 109 Tex. at 98, 200 S.W. at 375. One of the duties removed from the county attorney and given to the private contractor was "to report to the county judge estates subject to the tax, for which it is stipulated that he should receive a stipulated compensation." *Id.* at 100, 200 S.W. at 377. The Supreme Court noted that the county attorney had the exclusive right to prosecute such suits on behalf of the State, but held that this particular duty did "not involve the prosecution of suits," and thus did not interfere with any exclusive right or duty of the county attorney. *Id.* at 101, 200 S.W. at 377. Likewise, the duty given to private contractors under article 103.0031 does not involve the prosecution of criminal defendants and so in no way impinges upon the District Attorney's prosecutorial functions.

E. *Counties May Hire Private Contractors to Assist with County Business*

Even without article 103.0031, the County would have the right to enter into the contract at issue. "As the administrative head of county government, a commissioners court . . . possesses broad implied powers to accomplish its legitimate business," including "the authority to contract with experts when necessary, including attorneys." *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993). One area of legitimate county business is "the collection of debts outstanding in the county's favor." *Seagler v. Adams*, 238 S.W. 707, 709 (Tex. Civ. App.—Galveston 1922), *aff'd*, 112 Tex. 583, 250 S.W. 413 (1923) (adopting court of appeals decision). The only limit on this power is that the county may "not impinge on the statutory duties of other officials." *Guynes*, 861 S.W.2d at 863.

The contract at issue here does not impinge on the District Attorney's duties and is within the County's authority. For example, in *Teal v. State*, 230 S.W.3d 427, 432 (Tex. App.—San Antonio 2007, pet. denied), a county hired an attorney to assist the county attorney in representing the State in a petition to remove a county commissioner. The court of appeals held that because the private attorney did not usurp the county attorney's duties, this was within the county's authority to protect its interests. In the present matter, the County has hired a private attorney to protect its interests with respect outstanding fines, fees and costs due to the County. Although the private firm hired by the County does not rise to the level of an assistant in the litigation, it is clear that even if it did, it would be within the authority of the County to hire such an assistant.

F. *The Legislature Has the Authority to Designate the District Attorney's Duties*

Even if the efforts of the County's private collection firm could be held to impinge upon the District Attorney's duties, such a result is within the province of the Legislature. Unlike county attorneys, the Legislature has the constitutional authority to regulate the duties of district attorneys and thus has the authority to allow the County to hire private firms to collect fines, fees and costs owed to the County.

Article V, section 21 of the Texas Constitution provides that "if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature." In those counties that have a criminal district attorney, the courts have held that this constitutional provision gives the Legislature the authority to give the district attorney's prosecutorial functions to other officials. For example, article 45.201 of the Code of Criminal Procedure provides that "[a]ll prosecutions in a municipal court shall be conducted by the city attorney of the municipality or by a deputy city attorney." Although the Constitution does not give city attorneys any authority to represent the State in criminal prosecutions, the courts have held that in counties with a criminal district attorney, "under the plain language of the constitutional provision, the duties of the [criminal] district attorney shall be regulated by the legislature." *Martin v. State*, 13 S.W.3d 133, 139 (Tex. App.—Dallas 2000, no pet.); accord *Naff v. State*, 946 S.W.2d 529, 532 (Tex. App.—Forth Worth 1997, no pet.). Accordingly, the Legislature, through the Code of Criminal Procedure, validly "requires a criminal district attorney to consent to the city attorney's or his deputy's representation of the State." *Martin*, 13

S.W.3d at 133; *accord Naff*, 946 S.W.2d at 532. The Legislature can likewise require the District Attorney's consent to a private firm's attempts to collect fines, fees and costs due to the County from criminal cases.

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October 16, 2008

108.999999 000D1S

John Doe
111 Main Street
Edinburg, Texas 78537

Dear Mr. Doe:

This firm has been retained by Hidalgo County to collect your outstanding balance for:

08/19/08	999991	SPEEDING (EXCEED PRIMA FACIE L
08/19/08	999992	FAILED TO MAINTAIN FINANCIAL R

Your outstanding balance is \$815.10. Please remit your payment by money order, cashier's check or personal check (temporary checks will not be accepted) to Justice of the Peace, Precinct X, Place X, Hidalgo County, P. O. Box XX, Edinburg, Texas 78540 within 10 days. You may also pay online at <http://www.hidalgocountyclerk.us>. Check-by-phone payments may be accepted at our office, not the Justice of the Peace, Precinct X, Place X, at the toll free number listed below.

You may be subject to the issuance of an arrest warrant at any time if you do not promptly pay all required amounts, and your driver's license may be affected.

If you have made full payment within the last 10 days, you may disregard this notice. Please note that you may have other outstanding violations not included in this letter. If your case has not been adjudicated and you wish to enter a plea or go to trial on the offense(s) listed above, please contact the court at the address above and post a bond in an amount equal to your outstanding balance. If you pay the amount stated above, the court will enter a plea of no contest on your behalf and this matter will be concluded.

Courts can issue arrest warrants when fines go unpaid, so please give this matter your immediate attention. You may write us at the address listed above or contact us toll free at 866.233.2948, Monday-Thursday, 8:30 a.m. - 8:00 p.m., Friday, 8:30 a.m - 5:00 p.m. CST. Please include your driver's license or state ID, name and contact phone number in any correspondence.

Very truly yours,

Ray, Wood & Bonilla

Si usted necesita esta informacion en espanol, por favor pongase en contacto con nuestra oficina en 866.233.2948.

FFCS SYS.DMND.D1N/sys

October 16, 2008

108.999999 000D2S

John Doe
111 Main Street
Hidalgo, Texas 78557

Dear Mr. Doe:

You have failed to respond to our previous efforts on behalf of Hidalgo County to collect your outstanding balance for:

08/19/08	999991	SPEEDING (EXCEED PRIMA FACIE L
08/19/08	999992	FAILED TO MAINTAIN FINANCIAL R

Your immediate attention is required. **Enforcement may include issuance of an arrest warrant and may affect your driver's license. If an arrest warrant is issued, you may be subject to arrest at any time by a peace officer.**

Please send your payment immediately to Justice of the Peace, Precinct X, Place X, Hidalgo County, P.O. XX, Edinburg, Texas 78540 in the form of money order, cashier's check or personal check (temporary checks will not be accepted), for \$815.10. You may also pay online at <http://www.hidalgocountyclerk.us>. Check-by-phone payments may be accepted at our office, not the Justice of the Peace, Precinct X, Place X, at the toll free number listed below.

If you have made full payment within the last 10 days, you may disregard this notice. **Please note that you may have other outstanding violations not included in this letter.** If your case has not been adjudicated and you wish to plead "NOT GUILTY" and desire a trial to the offense(s) listed above, you must contact the court at the above address and post a bond in an amount equal to your outstanding balance. If you pay the amount stated above, the court will enter a plea of no contest on your behalf and this matter will be concluded.

Please call our office immediately, Monday-Thursday, 8:30 a.m. - 8:00 p.m., Friday, 8:30 a.m - 5:00 p.m. CST, toll free at 866.233.2948. Please include your drivers license or state ID, name and contact phone number in any correspondence.

Very truly yours,

Ray, Wood & Bonilla

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FFCS SYS.DMND.D2N/sys