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11 April 2011

Office of the Attorney General
Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: *Request for Attorney General's Opinion*

FILE # ML-46726-11
I.D. # 46726
RQ-0962-GA

Dear Chairman and Members of the Committee:

At the request of the County Treasurer of Archer County, Texas, I am requesting an opinion on the following issues:

- 1) Whether the County Judge may appoint counsel in criminal cases for non-indigent defendants, and,
- 2) Whether the County Judge may require the payment of attorney's fees from a defendant under an order of community supervision in an amount greater than the contractual amount for attorney's fees provided in the County's contract with a group of criminal defense attorneys, and,
- 3) What is the proper disposition of funds received by the County under a order of community supervision which are in excess of the amount of funds paid to appointed attorneys under a contract with the County for the service in representation of criminal defendants?

The facts giving rise to this request are as follows:

The Honorable Gary Beesinger is the County Judge of Archer County, Texas, who presides over criminal cases filed in the County Court for that County. There is no County Criminal Court in Archer County.

On December 31, 2009, the County and District Judges serving Archer County entered an order for compensation of attorneys appointed to represent indigent defendants. A copy of this order, entitled "Second Amended Archer County Standing Order for Compensation of Attorneys Appointed to Represent Indigent Defendants" is attached to this request. The order has not been superceded.

On January 11, 2010, the Commissioner's Court for Archer County, Texas, entered into a contract with two attorneys, Verner Wayne Hayhurst and David A. Levy, by which the County agreed to compensate these attorneys for their services for "court-appointed representation of

misdemeanor criminal court defendants found to be indigent and unable to afford legal counsel in matters pending before the Court.” The basic compensation for such service provided under the contract is \$150.00 for each guilty plea in a single misdemeanor case. A copy of this contract entitled “Service Contract for Misdemeanor Indigent Defense Plan” is attached to this request.

On at least two occasions during the year 2011, defendants appeared for arraignment before the County Judge charged in misdemeanor criminal cases. The Judge’s docket entries for these appearances show findings that the defendants were found not to be indigent. The Judge’s docket entries further show that after the respective defendants requested appointed counsel, the County Judge appointed one of the attorneys under contract with the County to represent that defendant in these criminal proceedings.

In the two cases referenced in the preceding paragraph and in at least four other cases, the Judge’s docket sheets and Judgments and Orders for Community Supervision show that the respective defendants were placed on community supervision in which the Orders call for the payment of attorney’s fees in the amount of \$225.00. Subsequent to the entry of these orders, Attorney Fee Vouchers were approved by the County Judge and submitted to the County Treasurer for payment of \$225.00 to the attorney named in the order. A copy of the Judgment and Voucher in a representative case is attached to this request. While the docket sheets in the latter four cases do not cite findings of non-indigency, they do not contain findings of indigency, and the Judgments and vouchers associated with the cases demonstrate that attorneys were appointed in these cases.

It appears that in at least two instances, it appears that court-approved vouchers were submitted to the County Treasurer by court-appointed attorneys for \$150.00, after the defendant was ordered to pay \$225.00 in the Judgment and Order for Community Supervision. The apparent intention of the County Judge is that a separate voucher for the \$75.00 difference would be submitted after the defendant had paid the \$150.00 attorney’s fee to the County, with the additional \$75.00 to be paid to the attorney at that time, making his total fee \$225.00.

The following are applicable arguments and authorities in this matter:

The County Judge cites the Texas Code of Criminal Procedure art. 1.051, a section under General Provisions, dealing with the right to representation by counsel. Under subsection (e) of that article, it is stated “If a non-indigent defendant appears without counsel at a proceeding after having been given a reasonable opportunity to retain counsel, the court, on 10 days’ notice to the defendant of a dispositive setting, may proceed with the matter without securing a written waiver or appointing counsel.”

The article cited provides no basis for the appointment of an attorney to a person found non-indigent. On its face, it is a provision that allows a trial court to force a defendant to trial who has not either retained or waived counsel. No reading of the article permits the interpretation given it by the County Judge.

The County Judge also cites Texas Code of Criminal Procedure art. 42.12, Sec. 11(a)(11) which states that the judge in a criminal proceeding may require a defendant placed on community supervision to reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for the representing the defendant.

Art. 1, Section 10 of the Texas Constitution provides for the right to counsel in a criminal

prosecution. This provision has been interpreted as requiring the appointment of counsel at state expense for indigent felony defendants. *Barbour v. State*, 551 S.W.2d 372 (Tex. Crim. App. 1977). The right has also been extended to a person placed on probation in lieu of jail sentence. *Alabama v. Shelton*, 534 U.S. 1110, 122 S. Ct. 1764, 75 (2002).

Under Texas Code of Criminal Procedure art. 26.04(a), an indigent defendant is entitled to court-appointed counsel for any offense that is punishable by imprisonment.

There is no provision of the Texas Code of Criminal Procedure which provides for the appointment of counsel to a non-indigent criminal defendant. The writer of this request is unable to find or cite any authority by which the County Judge in a criminal proceeding is authorized to appoint an attorney to represent a defendant whom he has found to be non-indigent.

Texas Code of Criminal Procedure art. 42.12, Sec. 11(a)(11) permits the Court to require reimbursement from a defendant for the services of appointed counsel. Under Texas Code of Criminal Procedure art. 26.05, a private attorney must be paid a reasonable attorney's fee for specified services. This section has been strictly construed to reflect the budgetary limitations affecting most counties. *Gray v. Robinson*, 744 S.W.2d 604, 606 (Tex. Crim. App. 1988). Payments made to court-appointed counsel must be made in accordance with a fee schedule adopted by the formal action of the judges of the county courts, statutory county courts, and district courts which try criminal cases in each county. When a fee schedule is adopted, a copy must be delivered to the commissioner's court of the county. All payments made under Texas Code of Criminal Procedure art. 26.05, dealing with Compensation of Counsel Appointed to Defend, are required to be made in accordance with this schedule of fees. The commissioner's court must pay the appointed counsel the amount that is approved by the presiding judge. Texas Code of Criminal Procedure, art. 26.05(b)(c).

Payments to court-appointed attorneys may be included in court costs, to be paid from the general fund of the county in which the prosecution was instituted. Texas Code of Criminal Procedure art. 26.05(f). As noted above, the Texas Code of Criminal Procedure art. 42.12, Sec. 11(a)(11) allows the Court to require a defendant placed on community supervision to reimburse the county for compensation paid to appointed counsel.

There is no authority for the practice of requiring a defendant to pay more than the amount authorized under the adopted fee schedule. Further, there is no authority for paying an appointed attorney directly from the funds of the defendant. As noted above, under Texas Code of Criminal Procedure art. 26.05(f), payments of court-appointed attorneys are made from the county's general fund, with only reimbursement to the county permitted as a condition of probation under Texas Code of Criminal Procedure art. 42.12, Sec. 11.

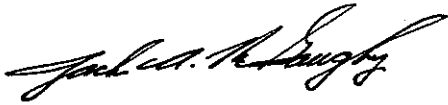
To order the payment of attorneys fees in an amount in excess of the amount approved by the Court in a voucher for specific services performed—even if the sum is passed through the County coffers—is to require a direct payment by the defendant to the attorney. None of the cited provisions allow for this.

In the event the attorneys fees ordered in amount of \$225.00 were received by the County but only \$150.00 was applied per the attorney's approved voucher, the \$75.00 difference cannot be counted as a court cost by the County Treasurer and applied as a court cost identified under Chapter 102, Texas Code of Criminal Procedure or kept as an unauthorized addition to the general fund of the County.

If any additional clarification of this request is needed, please contact me at the address above.

I appreciate your attention to this request and look forward to your response.

Yours very truly,

A handwritten signature in black ink, appearing to read "Jack A. McGaughey". The signature is written in a cursive style with a large, sweeping initial "J".

Jack A. McGaughey