



# MONTAGUE COUNTY ATTORNEY

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COUNTY ATTORNEY

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December 17, 2007

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Via Certified Mail RRR# 70070220000404517672

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

OPINION COMMITTEE

**RQ-0657-GA**

FILE # AL-45488-07

I.D. # 045488

Re: Request for Attorney General Opinion

Dear Sirs or Madames:

This office is seeking an Attorney General Opinion on matters involving funds collected by various public officials which, for purposes of this request are designated "fee fund accounts". These accounts are collected by the county sheriff, the county clerk, the district clerk and two justices of the peace pursuant to, among other statutes, §133 of the Local Government Code and Chapter 102 of the Code of Criminal Procedure (see also Chapter 103 CCP).

Prior to September 26, 2007, these funds were deposited periodically into the county treasury in a General Fee Fund Account by all officers collecting fee funds. Then, on a monthly basis, these amounts were accounted for and paid out for the purposes they were collected. Thereafter, payments were made to the various accounts and entities, such as the State Comptroller, as required. Checks drawn from these accounts for the purposes collected were signed by the county treasurer and county auditor.

In September of this year, the county auditor requested that the Commissioner's Court change the existing procedure. (See Exhibit "A", Agenda for Commissioner's Court Meeting for September 20, 2007). She requested that each elected official "have total responsibility for their own office fee fund, and the auditor's office would only be responsible for auditing the funds". (See Exhibit "B", Minutes of Commissioner's Court meeting of September 20, 2007). It is my understanding that was proposed by the auditor after she "polled" and received a response desiring this change by a majority of the officials. The commissioners voted to table the item until the next meeting.

The agenda for the Commissioner's Court meeting on September 24, 2007, reflected "request by Jennifer Essary, County Auditor, on fee funds". (See Exhibit "C", Agenda for September 24, 2007, Commissioner's Court Meeting). At that meeting, the auditor explained "that the county was out of compliance with the State Law on how the Officer Fee Fund was being handled, and explained after October 1, she would no longer be signing the Officer Fee Fund checks, for she was not authorized to be responsible for these funds." The Commissioners voted "to make no changes and to leave the Officer Fee

Fund as is." (See Exhibit "D", Minutes of Commissioner's Court Meeting of September 24, 2007)

On September 26, 2007, the county auditor sent a memo to the county depository bank notifying the bank that "we intend to split up the existing Fee Fund Account and give the authority on individual accounts back to the elected official." (See Exhibit "E", Memo from County Auditor dated September 26, 2007)

This item was again placed on the Commissioner's Court agenda for November 1, 2007. (See Exhibit "F", Agenda for November 1, 2007, Meeting of Commissioner's Court). At that meeting, the matter was tabled until the next regular meeting. (See Exhibit "G", Minutes of Commissioner's Court Meeting of November 1, 2007).

In the interim, this office was requested to render an opinion on the issue. On November 7, 2007, this office prepared a memo to the county commissioners, the county judge, the county auditor and the county treasurer. (See Exhibit "H", memorandum dated November 7, 2007, from the Montague County Attorney). Contemporaneously, this office submitted a "Memo to a Memo" to all the public officials affected by the outcome of this opinion, requesting any information which would change the opinion expressed in the memo and included a copy of the memo for their review (See Exhibit "I", Memo to a Memo from Montague County Attorney).

The Fee Fund issue was again placed on the Agenda for the Meeting of Commissioner's Court on November 13, 2007 (See Exhibit "J", Agenda for Commissioner's Court meeting on November 13, 2007).

At the meeting on November 13, 2007, a motion carried "that a letter be proposed to the depository explaining that the most recent Elected Official Officer Fee Fund had been opened up without the consent of the governing body of the County". (See Exhibit "K", Minutes of Meeting of Commissioner's Court on November 13, 2007).

Thereafter, Commissioner Tommy Sappington, acting as Montague County Judge Pro-tem, sent a letter to the depository bank indicating that the County Commissioners "voted to make no changes to the Officer's Fee Funds and to leave the Officer's Fee Fund as is". (See Exhibit "L", letter dated November 13, 2007, from Tommy Sappington to Legend Bank).

Please note that Montague County is a county with a population less than 50,000 (considerably less) and also that the funds involved were deposited into the county's depository bank.

The questions raised by these facts are as follows:

1. Are public officials who collect fee funds (as distinguished from such things as restitution accounts, trust accounts, etc.) authorized to create individual bank accounts in the county's depository bank such that they would control

- the account, have their name on the signature card and sign checks on that account?
2. Given the county auditor's authority to adopt and enforce regulations she considers necessary for the speedy and proper collecting, checking and accounting of the revenues and other funds and fees that belong to the county (as per Local Government Code §112.001), does such authority include the ability to create or establish bank accounts with the depository bank on behalf of public officials for fee funds at her instance or as directed by a county official?
  3. If, as opined in DM-396, there is no authority for the public officials who handle fee funds to set up individual accounts in their own name and such accounts are set up, who has the authority to close such accounts and deposit those accounts into the treasury - the commissioner's court, the auditor, or the official whose name is on the account?
  4. If, consistent with Local Government Code 133, fee funds are deposited in the county treasury by the collecting official:
    - a. must those funds be deposited by the collecting official directly into the county treasury account or should those funds be tendered to the county treasurer for deposit?; and
    - b. if checks are written on accounts set up for these funds, are they to be signed by the treasurer and the county auditor?

#### QUESTION 1

Generally, "the fees, commissions, funds, and other money belonging to a county shall be deposited with the county treasurer by the official who collects the money." Local Government Code (hereafter LGC) §113.021. It has been suggested that since a portion of these funds are collected for the state, they should be held in a separate bank account by the office holder pending payment; however, LGC §133.052 provides that the entirety of these funds are to be paid to the county treasury before disbursement to the comptroller. The county treasurer then disburses the amounts due to the comptroller on a quarterly basis. (LGC §133.055).

The money collected by the tax assessor-collector is governed by the Tax Code (see Tax Code §31.10 and AGO JC-0231) and provides that those sums are to be deposited into that unit's depository. Therefore, money collected for these purposes may be deposited into the assessor-collector account according to the Tax Code and are not a subject of this opinion.

LGC §113.022 likewise provides that money is to be deposited with the County Treasurer, and in a county of the population of Montague County, it may (with commissioners court approval), be deposited within 30 days after the funds are received.

The Code of Criminal Procedure (hereafter CCP) Art. 103.004 also provides that "an officer who collects recognizances, bail bonds, fines, forfeitures, judgments, jury fees, and other obligations received in the name of the state under any provision of this title shall deposit the money in the county treasury ..." and, in a county with a population the size of Montague County, with the authorization of the commissioners court, within 30 days after it is collected. This section applies to District Clerks, County Clerks, Justices of the peace, as well, as Sheriffs. Each of these officials who collect such fees shall keep a fee record of amounts collected. CCP Art. 103.009.

The county auditor maintains an account for each county, district or state official authorized or required to receive or collect money for the use of the county, LGC §112.005. The auditor shall require each such person to render statements to the auditor regarding these accounts. The county auditor has general oversight of these books and records. LGC 112.006. (See also AGO.JC-0031 as applied to the district clerks).

These officers shall deliver the receipt book (or copies of receipt records contained in a computer database) to the county auditor at the end of each month's business or at the end of each month and shall allow the county auditor electronic access to these records. CCP Art. 103.011. The auditor shall then examine these records to determine if the money collected has been disposed of properly. The deposit of these funds into the treasury does not change the ownership of these accounts, but it does indemnify the office holder and their surety during the period it is on deposit with the county. LGC §113.024. The Attorney General has opined that different county funds may be placed in a single bank account if proper accounting procedures are adopted to insure that the funds are utilized for the correct purposes. AGO H-1254.

The specific issue of whether CCP §103 funds could appropriately be deposited into separate justice of the peace accounts was considered in AGO DM-396. The Attorney General concluded:

"Article 103.004 of the Code of Criminal Procedure, which requires the justice of the peace "immediately" to deposit with the county treasurer fines he or she collects, does not permit a justice of the peace first to deposit fines into a separate checking account and subsequently to deposit the funds into the county treasury. A justice of the peace who violates article 103.004 may be prosecuted for abuse of official capacity under section 39.02(a) of the Penal Code; the justice of the peace also may be removed from office under section 87.013(a)(2) of the Local Government Code or under article V, section 1-a(6) [\*23] of the Texas Constitution." AGO DM-396.

The same reasoning would apply to other public officials who collect CCP Article 103 funds.

This circumstance was also considered as it related to electronic transfers (see AG; Letter Opinion 98-004) with a similar conclusion.

Based on the above quoted code citations and attorney general opinions, it is my opinion that officials who collect funds pursuant to CCP Art. 103, as well as various sections of the Local Government Code, should deposit these funds directly into the county treasury in a sub account earmarked for the purposes for which they were collected.

## **QUESTION 2**

Local Government Code §112.001 permits the county auditor in a county with the population of less than 190,000, to adopt and enforce regulations for speedy and proper collecting, checking and accounting of county funds. §116.021 Local Government Code provides that the Commissioners Court select the depository and sub-depository of the County.

If the answer to the first question posed is that there is no authority for officials collecting fee funds to set up separate accounts instead of depositing those collections into the county treasury, then this question is moot; However, to the extent that the question regarding authority to set up separate bank accounts is still an issue, the Attorney General's Office was opined "that the authority of the commissioner's court to create classes of funds, to select county depositories, and to require separate accounts to be kept includes the authority to require a separate bank account be established...." Attorney General Opinion No. JM-110. While this was in the context of an airport fund, similar reasoning would apply to fee fund accounts.

To the extent that any separate bank accounts may be created for the deposit fee fund, the authority to create such accounts lies with the commissioner's court. The county auditor has broad authority to audit and account for funds deposited in those accounts.

## **QUESTION 3**

Again, assuming pursuant to Question 1, there is no authority for public officials to set up individual fee fund accounts and such accounts have been created by those officials acting through the auditor or directly, under the name of and in the control of the officials, it would be up to the officials involved to close the accounts and deposit those funds with the county treasurer.

If the officials do have the authority to open, maintain and control these fee fund accounts, they would continue the accounts or close the accounts and deposit the proceeds with the county treasurer as they see fit.

#### QUESTION 4

The ability of an official collecting fee funds to make deposits directly into the county's treasury account would constitute a convenience in a county such as Montague. The two Justice of the Peace offices are in towns in which branches of the county depository are located. The county seat where the County Treasurer's office is located is in a different town. It would be helpful for the JP's to be able to simply make a deposit locally and not deliver the funds to the treasurer. Local Government Code §113.021 requires that such funds "shall be deposited with the treasurer by the office who collects the money." The treasurer then deposits the money in the county depository. The money so deposited is then credited to the collecting office. However, the Office of the Attorney General has previously held that funds collected by an official may be transferred by the official to the treasurer's account and not necessarily to the "treasurer in person" (Letter Opinion 98-004) "unless the county auditor has adopted regulations restricting such a practice."

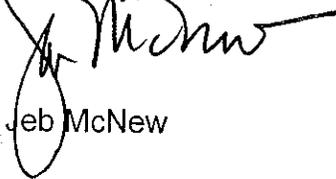
The authority to sign checks for disbursements of funds in these accounts is unclear. While these funds are not budgeted items, generally checks written on a county account are signed by the county treasurer and countersigned by the county auditor pursuant to §113.043 of the Local Government Code. See also AGO H-183.

#### CONCLUSION

In summary, it is my opinion that fee fund accounts should be deposited with the county treasurer and not into separate accounts opened and controlled by the official collecting such fees. Neither the county auditor nor the officials have the authority to change this procedure. If any such individual accounts have been created erroneously, the official opening the account should close the account and deposit the funds with the county treasurer. If the county auditor approves of this procedure, deposits may be made by collecting officials directly into the depository bank and not physically deposited with the county treasurer. Checks written on the funds (as sub accounts of the County's account in the depository bank) should be signed both by the county treasurer and county auditor.

I would appreciate your considering these issues and rendering an opinion. If you have anything further you require from me, please advise.

Sincerely,



Jeb McNew

Office of the Attorney General  
December 17, 2007  
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JM/dc  
Enclosures

cc: County Judge  
County Commissioners  
County Treasurer  
County Auditor

commissioner.attorney.general.fee.fund.opinion.request.121707.wpd