

**OFFICE OF THE****COUNTY****AUDITOR**I.D.# **49247**

LISA DAVIS
FIRST ASSISTANT

JANIE GARCIA
GRANTS/ PAYROLL SUPERVISOR

DALE ATCHLEY, CPA
COUNTY AUDITOR

ELVA FUENTES, CFE
INTERNAL AUDIT SUPERVISOR

KIMBERLY RAYOS
ACCOUNTS PAYABLE SUPERVISOR

March 9, 2023

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

Via Email: opinion.committee@oag.texas.gov

Re: Request for Attorney General Opinion

Dear Opinion Committee:

This request for a reasoned opinion contains appropriate briefing of the issues.

A reasoned opinion is requested on three issues:

1. Is a removal proceeding pursuant to TEX. LOC. GOV'T CODE, Ch. 87, a "suit" such that a county official would be entitled to a legal defense provided by the county pursuant to TEX. LOC. GOV'T CODE § 157.901?
2. (a) Is it still the Attorney General's opinion that district attorneys are "district officials" and not county officials or employees for purposes of § 157.901, and (b) therefore, even if a removal proceeding is a "suit" within the meaning of § 157.901, the county is not required pursuant to § 157.901 to provide a legal defense to a district attorney in a chapter 87 removal proceeding?
3. Where a removal petition asserts arguable and/or specific criminal conduct as a basis for removal, must a commissioners court wait until the close of the removal proceedings to determine whether it may exercise its common-law discretion to reimburse defense costs or provide a defense pursuant to § 157.901?

Background

A petition to remove the District Attorney for the 105th Judicial District of Nueces County, Texas ("District Attorney") is pending in the 319th Judicial District Court, Nueces County, Texas, Cause No. 2023DCV-0244-G.¹ The removal is pursuant to chapter 87 of the Texas Local Government

¹ Because this action seeks the removal of the District Attorney, the Nueces County Attorney is required to represent the State in the removal proceedings. TEX. LOC. GOV'T CODE § 87.018(d) ("The county

Code for alleged incompetency, official misconduct, and failure to give bond.² An informal request has been made for Nueces County to provide a legal defense to the District Attorney pursuant to TEX. LOC. GOV'T CODE § 157.901.

Discussion

A. **No cases resolve whether a removal proceeding pursuant to TEX. LOC. GOV'T CODE, Ch. 87, is a “suit” such that a county official would be entitled to a legal defense provided by the county pursuant to TEX. LOC. GOV'T CODE § 157.901.**

A county’s expenditure of funds to provide counsel to its officials and employees must be based on the Texas Constitution or authorizing statutes. Anderson v. Wood, 152 S.W.2d 1084, 1085 (Tex. 1941). Tex. Loc. Gov’t Code § 157.901 provides:

(a) A county official or employee sued by any entity, other than the county with which the official or employee serves, for an action arising from the performance of public duty is entitled to be represented by the district attorney of the district in which the county is located, the county attorney, or both.

(b) If additional counsel is necessary or proper in the case of an official or employee provided legal counsel under Subsection (a) or if it reasonably appears that the act complained of may form the basis for the filing of a criminal charge against the official or employee, the official or employee is entitled to have the commissioners court of the county employ and pay private counsel.

(c) A county official or employee is not required to accept the legal counsel provided in this section.

Section 157.901 is limited to individuals being “sued”. *Id.* The Attorney General has noted that not all “legal actions” are “suits” within the meaning of § 157.901. In its analysis of whether “suits” include commission disciplinary proceedings, the Attorney General observed that the dictionary definition of “sue” and “suit” involve a legal proceeding of one party against another. Tex. Att’y Gen. Op. KP-0027 (2015). Accordingly, the Attorney General has opined that disciplinary proceedings do not amount to “suits” within the meaning of § 157.901. *Id.* See also Tex. Att’y Gen. Op. JM-755 (1987) (court of inquiry proceeding is not a “suit” within meaning of predecessor of § 157.901).

conflicts of interest, this request has been prepared by outside counsel upon request of the Commissioners Court.

² A copy of the removal petition, without exhibits, is attached. In general, the petition alleges mismanagement of cases, office mismanagement, failure to seek indictments to revoke probations, incompetency based on dismissal of cases, stated refusal to prosecute cases related to illegal abortions and gender transitioning of minors, using government resources for personal benefit, failure to disclose travel benefits, and failure to provide proper and/or timely bond.

Similarly, the Texas Supreme Court has determined that “suits” are not the same as “legal actions” in general. When interpreting the applicability of the Texas Citizen’s Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.* (“TCPA”) to a removal action, the Supreme Court observed that legal actions as defined in the TCPA include “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.” State ex rel. Best v. Harper, 562 S.W.3d 1, 8–9 (Tex. 2018), *as corrected on denial of reh’g* (Dec. 21, 2018). Accordingly, it appears that the term “suit” does not refer to every type of legal action.

One court of appeals has limited § 157.901’s obligation to provide and/or pay for representation of county employees and officials “sued” to only civil lawsuits. *See generally*, White v. Eastland Cnty., 12 S.W.3d 97, 102 (Tex. App.—Eastland, 1999). In its discussion, the Court of Appeals determined “[i]t is obvious that the legislature was referring to civil suits” in each iteration of current § 157.901. *Id.* at n.4. Accordingly, despite prosecutions being legal proceedings of one party (the State) against another (the defendant) criminal actions are outside the coverage of 157.901. *Id.* at 102. Further, while not stated, civil lawsuits present a number of available remedies such as money damages, injunctive relief, etc. In contrast, the only relief available in a removal action is to have the official removed from office. *See e.g.*, TEX. LOC. GOV’T CODE § 87.012, .013, .014, .018.

Removal or ouster proceedings are governed by TEX. LOC. GOV’T CODE § 87.015. Section 87.015 and related sections do not use the terms “suit” or “sue” when addressing removal actions. Instead, the action is described as a “proceeding” initiated by a petition. *Id.* While the proceedings are to “be conducted as much as possible in accordance with the rules and practice of the court in other civil cases”, *id.* § 87.018(b), the proceeding is never described in the statute as a “suit”. In contrast for example, the Texas Rules of Civil Procedure expressly refer to “suits”. *See generally, e.g.*, TEX. R. CIV. P. 6 (“Suits” commenced on Sunday”); 7 (parties to “suits” may appear by counsel); 22 (“civil suits” commenced by petition); 23 (“suits” number consecutively); 28 (“suits” in assumed name); 30 (parties to “suits”). Conversely, other actions described in the Rules of Civil Procedure are clearly not suits and do not use the term suit. For example, Rule 202 sets forth the procedures to obtain an order for a deposition when no suit exists. TEX. R. CIV. P. 202.1 (allowing depositions in anticipation of a suit or to investigate a potential suit). Thus, it appears clear that all suits are civil proceedings, not all civil proceedings are suits.

Nevertheless, although the issue was not before the Court in State ex rel. Best v. Harper, the Texas Supreme Court repeatedly referred to the underlying removal proceeding as an “ouster suit”. *E.g.*, 562 S.W.3d at 5, 10 (referring to “ouster suit”). It is not clear whether the language used by the Court was indicative of a conclusion that a chapter 87 removal proceeding constituted a “suit” for purposes of § 157.901 as it does not appear that the matter was before it. In fact, because the issue before the Court was the official’s right to recover attorney’s fees pursuant to the TCPA, it appears that no legal defense was provided by the county pursuant to § 157.901 or otherwise.

It appears clear that criminal proceedings do not trigger § 157.901 obligations. White, 12 S.W.3d at 102 & n. 5 (criminal actions are outside the coverage of § 157.901). The Texas Supreme Court has stated ouster proceedings are “quasi criminal in nature and it would seem that the only issue

presented would be whether or not the defendant were (sic) guilty of the charges brought against him.” State ex rel. Dishman v. Gary, 359 S.W.2d 456, 460 (Tex. 1962) (internal citation omitted).

State ex re. Dishman was also mentioned in the State ex rel. Best case, *supra*, for the proposition that when the Texas Supreme Court acknowledged the quasi-criminal nature of removal proceedings, it noted that the proceedings do not allow for cross actions. State ex rel. Best, 562 S.W.3d at 10. It was asserted in State ex rel. Best that a claim for attorney’s fees under the TCPA amounted to a cross action, which by application of State ex re. Dishman, was not allowed. *Id.* The Supreme Court did not deviate from its description of removal actions as being quasi-criminal in nature but instead determined that the TCPA could allow for recovery of fees even if the removal statute did not. *Id.*

Yet, although the Texas Supreme Court found that the TCPA could allow for fees even in a removal proceeding, it also determined that certain allegations in the removal action were outside the scope of the TCPA. In particular, the TCPA does not apply to “enforcement actions”. State ex rel. Best, 562 S.W.3d at 13-14 (discussing TEX. CIV. PRAC. & REM. CODE § 27.010(a)). Thus, allegations in the removal petition of official misconduct premised on unlawful actions were outside the scope of the TCPA.

The subject removal petition alleges official misconduct that may form the basis for unlawful, e.g., criminal conduct. In particular, the allegation of misuse of government property for personal benefit, may constitute a violation of Tex. Penal Code § 39.02(a)(2).³ Removal Pet., p. 14. When discussing unlawful conduct allegations contained in a removal petition for purposes of the TCPA’s application, the Texas Supreme Court concluded that such official misconduct allegations constituted an “enforcement action” and thus were outside the scope of the TCPA regardless of the merits of the allegations. State ex rel. Best, 562 S.W.3d at 14-15.

We have found no Attorney General or court opinions that expressly state that an ouster/removal proceeding is or is not a “suit” for purposes of § 157.901. Such an action does not appear to be a “civil suit” as commonly understood but is instead of the nature of a quasi-criminal action. Further, in this instance official misconduct is alleged as well as a specific violation of the Texas Penal Code. The Attorney General and at least one court of appeals has determined that § 157.901 does not apply to criminal actions.

Accordingly, guidance on whether a chapter 87 removal action is a “suit” for purposes of § 157.901 is requested.

B. The Attorney General has opined that district attorneys are considered “district officials” and not county officials or employees for purposes of § 157.901. Therefore, even if a removal proceeding is a “suit” within the meaning of § 157.901, it appears that a district attorney is not entitled to be provided with a legal defense in a chapter 87 removal proceeding.

³ When discussing alleged failure to report travel-related benefits received by the District Attorney, the petition also references TEX. PENAL CODE § 36.02(a) (bribery). However, it is not clear whether a violation of the statute is being asserted. *See* Removal Pet., pp. 15-17.

Aside from being elected as the district attorney for a specific judicial district, the functions of a district attorney share elements with being a State agent and, possibly a county agent. While not all inclusive, the following summary from a federal judge in the Western District of Texas stated the dichotomy somewhat succinctly:

A Texas District Attorney acts as an agent of the State, when he performs duties within his prosecutorial capacity. These prosecutorial duties include: (1) instituting criminal proceedings to enforce state law; (2) determining whether to initiate or dismiss criminal charges; (3) using peremptory challenges during jury selection; (4) denying a prisoner the right to proceed in forma pauperis on appeal and the right to self-representation; and, when exercising delay in the presentation of the case to the grand jury.

On the other hand, if a district attorney acts outside the scope of his prosecutorial duties, the county may be held liable under certain limited circumstances. In particular, a Texas county may be liable for actions of a District Attorney that are administrative or managerial in nature if the prosecutor functions as a final policymaker for the county. For example, a district attorney with the final word on hiring or firing within the district attorney's office sets county policy regarding those decisions. In addition, a Texas district attorney acts as county official in setting county policy for the authorization of misdemeanor warrants.

Zinter v. Salvaggio, No. SA-18-CV-00680-JKP, 2021 WL 1381231, at *4 (W.D. Tex. Apr. 12, 2021) (internal quotes and citations omitted). *See also* Crane v. State, 766 F.2d 193, 195 (5th Cir.1985), *cert. denied sub. nom.*, Dallas County v. Crane, 474 U.S. 1020 (1985) (finding a district attorney to be a county official for purposes of county liability stemming from the district attorney's responsibility for the county policy under review and due to the district attorney's local election, funding, powers, and duties)). *But see* State ex rel. Hill v Pirtle, 887 S.W2d 921, 927 (Tex. Crim. Appeal 1994) (en banc) (district attorney "is the only person whose discretion controls who will, or will not, serve on his staff. Neither the district courts, nor the county commissioners . . . , possess authority over a [district attorney's] decision of who will be appointed to his staff.").

Again, while not all inclusive, the above recognizes that for purposes liability, the actions of a district attorney may constitute actions of a county. None of the allegations asserted in the Removal Petition suggest that the District Attorney was acting in any capacity other than as District Attorney.

The Attorney General has historically recognized that a district attorney is a district officer and not a county officer for purposes of § 157.901 and therefore a commissioners court has no obligation under § 157.901 to pay for a district attorney's legal defense. Tex. Att'y Gen. Op. GA-0755 (2010) (no obligation for a defense to federal civil rights lawsuit). *See also* Tex. Att'y Gen. Op. GA-0523 n.3 (2007) (acknowledging prior opinions that a district attorney is a district officer and not a county officer); Tex. Att'y Gen. Op. JM-1276 (1990) (noting predecessor of § 157.901 does not

apply to district offices); Tex. Att'y Gen. Op. MW-252 (1980) (deciding under predecessor to § 157.901 that district attorneys are not county officials or employees for purposes of the statute).⁴

Accordingly, given the time since the Attorney General's latest opinion specifically relating to whether a district attorney is a county official or employee within the meaning of § 157.901, it is requested whether it is the Attorney General's current opinion that a district attorney is not a county official or employee within the meaning of § 157.901 and whether pursuant to § 157.901 the county is required to pay for legal representation of a district attorney's defense in a chapter 87 removal proceeding.

C. Where a Removal Petition Asserts Arguable and/or Specific Criminal Conduct as a Basis for Removal, Must the County Wait Until the Close of the Removal Proceedings To Decide Whether It May Reimburse Defense Costs or Provide a Defense Pursuant to § 157.901?

The Attorney General has advised that even a legal defense provided pursuant to § 157.901 must be applied consistent with the limitations imposed by the Texas Constitution. Tex. Att'y Gen. Op. KP-0031 (2015). Accordingly, § 157.901 "does not require a commissioners court to pay for private legal representation of a county official or employee in a particular case when such payment does not serve a legitimate interest of the county." *Id.*

Under the common-law, even in the absence of § 157.901 a commissioners court may provide a defense for a county official or employee if it determines the payment primarily serves the legitimate interests of the county and not merely personal private interest of the official or employee and the claims are based on actions taken within the scope of official duties. Tex. Att'y Gen. Op. No. KP-0031 (2015). Other than with respect to criminal matters, "the propriety of such an expense is not made dependent upon the outcome of the litigation, but upon the bona fides of the governing body's motives." Tex. Att'y Gen. Op. No. KP-0037 (2015) (quoting Tex. Att'y Gen. Op. Nos. JC-0047 (1999) at 2) (additional citations and internal quotations removed)

Even under the common-law, "there is no public interest in defending a guilty official from prosecution". Tex. Att'y Gen. Op. No. JC-0294 (2000). However, after a county official has been found to be not guilty, a county may use its common-law authority to reimburse the cost of legal expenses. Tex. Att'y Gen. Op. No. KP-0037 (2015). *See also* Tex. Att'y Gen. Op. No. JC-0047 (1999) (exercise of common-law spending authority is not mandatory but is permissive).

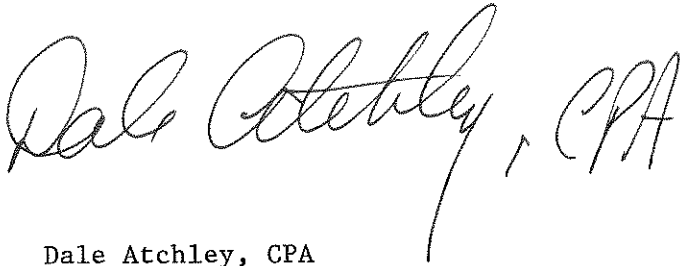
As stated above, the subject removal petition alleges at least one unlawful/criminal act. Removal Pet., p. 14 (misuse of government property). However, a removal action is not a criminal

⁴ Also, the Texas Supreme Court's opinion in State ex rel. Best may suggest that it is not the practice to pay for the legal representation of district officials in ouster/removal proceedings. State ex rel. Best involved proceedings to remove a board member of a county hospital district. 562 S.W.3d at 2. The board member filed a successful motion to dismiss pursuant to the TCPA. The issue before the Supreme Court was whether the district board member was entitled to attorney's fees pursuant to the TCPA. If the county had provided the defense for the board member, there would have been no reason for the board member to seek attorney's fees. It seems that § 157.901 may not have applied because either (a) the underlying matter was an ouster proceeding or (b) it involved a "district" board member and not a county official.

proceeding, and the only relief is removal from office. TEX. LOC. GOV'T CODE § 87.012, .013, .014, .018. Yet, the Texas Supreme Court has described removal proceedings as “quasi criminal in nature . . . [where] . . . the only issue presented would be whether or not the defendant were (sic) guilty of the charges brought against him.” State ex rel. Dishman, 359 S.W.2d at 460. *See also* TEX. LOC. GOV'T CODE § 87.018(c) (no special issues allowed, “judge shall instruct the jury to find from the evidence whether the grounds for removal alleged in the petition are true”).

In the above circumstance may the Commissioners Court wait until the close of the removal proceedings to determine whether it may exercise its discretion to reimburse defense costs or provide a defense pursuant to § 157.901?

Thank you for your courtesies, if you need any additional information or clarification, please contact retained counsel, Keith B. Sieczkowski, ksieczkowski@branscomblaw.com, (361) 886-3841.

A handwritten signature in black ink that reads "Dale Atchley, CPA". The signature is written in a cursive style with a large, sweeping initial "D".

Dale Atchley, CPA
Nueces County Auditor