

DYKEMA COX SMITH

TO: Susan Fletcher, Collin County Commissioner Precinct 1
FROM: Dykema Cox Smith (Christopher D. Kratovil & J. Matthew Sikes)
RE: **Payment of Attorneys' Fees of Special Prosecutors in Paxton Matter**
DATE: October 24, 2016

INTRODUCTION

This memorandum addresses the options of the Collin County Commissioners Court (the “Commissioners Court”) concerning the payment of the fees of the Special Prosecutors appointed by Judge Scott Becker in the Ken Paxton criminal prosecution (the “Special Prosecutors”). The Special Prosecutors are not employees of Collin County, a neighboring county or the State of Texas, but instead are private criminal defense attorneys from the Houston area whom Judge Becker agreed to have Collin County pay at a rate of \$300 per hour, with no cap, for their work on the Paxton matter.

There is concern that the visiting judge now presiding over the Paxton criminal matter, Judge George Gallagher of Tarrant County, could potentially hold members of the Collin County Commissioners Court in contempt of Court if the current six-figure invoice for the Special Prosecutors is not paid in full.

A preliminary analysis conducted by our law firm, Dykema Cox Smith, demonstrates that the Commissioners Court has several legal avenues it should fully explore *prior to making any future payments*, and that Judge Gallagher may have, as a matter of law, abused his discretion in authorizing the payment of such unprecedented fees—which will ultimately total well over \$2,000,000.00—to the Special Prosecutors in this matter.

ANALYSIS

I. The Fees Are in Excess of Those Permitted Under Texas Law

The appointment and payment of special prosecutors is governed by TEXAS CODE CRIM. P. ART. 2.07, which states as follows:

If the appointed attorney is not an attorney for the state, he is qualified to perform the duties of the office for the period of absence or disqualification of the attorney for the state on filing an oath with the clerk of the court. He

shall receive compensation ***in the same amount and manner as an attorney appointed to represent an indigent person.***

TEXAS CODE CRIM. P. ART. 2.07(C) (emphasis added). The lead Special Prosecutor selected here, Mr. Brian Wice, is not an attorney for the State of Texas or any of its political subdivisions. Instead, Mr. Wice is a private criminal defense attorney from the Houston area. As a result, the compensation afforded to the Special Prosecutors must comply in this case with the Collin County Indigent Defense Fund (the “IDF”), a plan established by the district judges of Collin County in compliance with the Texas Fair Defense Act. In short, under the plain language of TEXAS CODE CRIM. P. ART. 2.07, the Special Prosecutors in this case should be paid on the same schedule and plan as any other “appointed attorney [who] is not an attorney for the state” in Collin County. We therefore look to the Collin County IDF fund to determine how the Special Prosecutors should be compensated.

The IDF, adopted pursuant to the Texas Fair Defense Act, provides for a specific fee schedule for attorneys representing parties in felony cases. The charges against Attorney General Paxton include felony charges. Therefore, the felony schedule of the Collin County IDF controls. That schedule provides for hourly rates only in capital or death penalty cases. For all other felonies, the schedule provides for a “per case” flat fee schedule as follows:

First Degree Felony: \$1,000.00
 Second Degree Felony: \$750.00
 Third Degree and State Jail Felonies: \$500.00

There are only three ways to exceed the limits of the Collin County IDF. First, an appointed attorney is entitled to additional compensation in the event of a trial, in which case a party is entitled to \$1,000.00 in fees for trial preparation and subsequently to \$500.00 per 1/2 day at trial or a maximum “per case” discretionary adjustment ***not to exceed \$1,000.00***. IDF, at 4.01(a) (emphasis added). Second, in cases with a minimum 15-year sentence, the appointed attorney may receive a further \$3,000.00 adjustment.

Here, the charges against Attorney General Paxton include a first degree felony, which carries a minimum sentence of five years. However, there has not been a trial. Therefore, the maximum amount available under the Collin County IDF for the Special Prosecutors in the Paxton matter is as follows: \$1,000.00 (for first degree felony) + \$1,000.00 (maximum discretionary adjustment) = \$2,000.00 maximum in fees, plus additional fees for trial depending upon if a trial ever occurs and how long it lasts.

The requested fees of the Special Prosecutors exponentially exceed the amount authorized by the Collin County IDF formula, in direct contravention of the statute and the IDF Rules. For example, a one-million dollar fee for the Special Prosecutors would represent a one-thousand (1,000) fold multiple of the statutorily authorized pre-trial fees of \$1,000.00. Such an exceptional fee must be justified by exceptional circumstances—but the District Court has not yet offered any on-the-record holding as to what it believes the “exceptional circumstances” are in this run-of-the-mill mid-sized state securities fraud case against an individual defendant in his private capacity.

The only possible basis for the massive departure from the IDF fee schedule in the Paxton case is found in Section 4.02(b) of the IDF Rules, which provides that “[t]he Judge presiding over a case may authorize payment to appointed counsel that varies from the fee schedule in unusual circumstances or where the fee would be manifestly inappropriate because of circumstances beyond the control of the appointed counsel.” (emphasis added). Here, however, there are not yet any on-the-record findings as to what the “unusual circumstances” rendering the usual IDF fee schedule “manifestly inappropriate” are. Nor is there an on-the-record explanation as to how those unspecified “unusual circumstances” are “beyond the control of the appointed counsel.” It is unclear why the Special Prosecutors would be permitted to so vastly exceed—by an exponential factor—the IDF fee schedule here.

Moreover, as applied by the District Court in the Paxton matter, Section 4.02(b) would become the proverbial “exception that swallows the rule” as these Special Prosecutors would be paid literally thousands of times what is authorized by the statute and Collin County IDF. Importantly, Texas courts do not hesitate to enforce fee schedules on appointed counsel, even when result of the schedule may appear inequitable to the appointed counsel. *See Freeman v. State*, 556 S.W.2d 287, 303 (Tex. Crim. App. 1977) (finding no error in a murder case where a request to exceed the fee schedule was denied where “[t]he four indictments referred to by appellant all are for offenses arising on the same day out of the same criminal episode, and the physical location of each was in Atascosa County.”).

While the Defendant in this matter, Ken Paxton, is certainly a high-profile person, the charges against him involve events that occurred locally and prior to his election as Texas Attorney General. Moreover, the charges do not allege an abuse of the high office that Paxton now holds, nor do they allege official public corruption or misconduct of any sort. On the contrary, this is a prosecution of an individual Collin County resident in his personal capacity in a mid-sized securities fraud case. Therefore, it is unclear why this prosecution should be deemed “unusual,” or how the fee schedule set by the IDF Rules are “manifestly inappropriate because of circumstances beyond the control of the appointed counsel.”

Indeed, the routine securities fraud charges against Paxton do not even qualify for hourly rates under the ordinary fee schedule of the Collin County IDF. To further illustrate, this is obviously not a capital punishment prosecution, but the Special Prosecutors here nonetheless seek to be paid several thousand times what the attorneys appointed to defend death penalty cases receive under the Collin County IDF at an hourly rate double that approved by the IDF for counsel appointed in death penalty cases. In short, the Collin County IDF reserves its highest compensation for counsel appointed in death penalty cases, but the Special Prosecutors here nonetheless seek multiples of the compensation authorized in death penalty cases.

Notably, other prosecutions of public officials for individual misconduct have been handled without the use of private special prosecutors, via the use of assistant district attorneys on assignment from neighboring counties. For example, in 2007-08 two Collin County assistant district attorneys served as special prosecutors and successfully prosecuted and convicted Ray Sumrow, then the District Attorney of Rockwall County, without substantial additional expense to the taxpayers of either county. It is unclear what “unusual circumstances” justify such a dramatic departure from that fiscally prudent precedent here, and none have been officially

identified by the District Court. Against this backdrop, the District Court's decision to compel payment of the Special Prosecutors' invoices is potentially ripe for challenge now and in the future as an abuse of discretion.

It is important to note that the question of whether or not the Special Prosecutors' fees have been properly authorized in the first place is *separate and apart* from the independent question of whether or not those fees are "reasonable" as that term is understood in the context of attorneys' fees under Texas law. The "reasonable" analysis focuses on the propriety of the work performed, not the propriety of the assignment that resulted in the work in the first place. Under Texas law, fees of appointed counsel are generally considered "reasonable" if approved by the trial court. See *Miller v. State*, 755 S.W.2d 211, 216 (Tex. App.—Dallas 1988) *rev'd on other grounds*, 815 S.W.2d 582 (Tex. Crim. App. 1991).

Here, it may be possible that the fees generated by the Special Prosecutors are simultaneously "reasonable" *and* unauthorized by the IDF and statute because the decision to appoint Special Counsel and to allow the Special Prosecutors to bill at an hourly rate with no cap was itself unreasonable and an abuse of discretion. This unreasonability could be due to the lack of "unusual circumstances" or the fact that the IDF fee schedule is not "manifestly inappropriate" in this case. Simply put, in determining whether or not this exponential departure from the IDF schedule is permitted, the relevant analysis is not the quality of the work performed, but whether the appointment of private Special Prosecutors was appropriate and necessary in the first place. These are analytically distinct questions.

II. The Commissioners Court Should Explore Several Legal Options Prior to Making Future Payments.

Some assert that the Commissioners Court has no option but to immediately comply with the District Court's order to pay the Special Prosecutors fees. However, given the unique nature and the current posture of this case, the Commissioners Court has several options to forestall this payment and future payments pending the resolution of the questions discuss above concerning its validity.

The County Commissioners can seek appellate review of the District Court order by attempting to stay that order and simultaneously filing for a writ of mandamus in the Court of Appeals asking the Court to reverse the District Court ruling as an abuse of discretion. Mandamus is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992). A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985). Here, where the District Court has offered no official explanation of the the "unusual circumstances" justifying such a large fee, there is a reasonable argument that the District Court may have abused its discretion in authorizing the payment of a fee that exponentially exceeds what is permitted by the IDF.

In order to forestall any immediate contempt action, the Commissioners Court could either: (1) offer to pay funds into the registry of the District Court pending the resolution of the

fee issue by the Court of Appeals; or (2) post a supersedeas bond sufficient to satisfy the disputed amount, and then pursue an appeal to the Fifth District Court of Appeals. Either of these options would likely offer a shield against contempt during the pendency of appeal, as they demonstrate a willingness by the Commissioners Court to pay provided that the Special Prosecutors' bill is ultimately found valid by the Court of Appeals.

In addition to the reasons outlined above, several arguments exist supporting the idea that the District Court should not be able to compel the Commissioners Court to pay such an excessive fee without any exercise of discretion on its own. Specifically, the Texas Supreme Court has held that a District Court cannot substitute its own judgment for that of the County Commissioners Court. *See Ector County v. Stringer*, 843 S.W.2d 477, 479 (Tex. 1992). Collin County has, pursuant to the statute, established a compensation scheme for appointed prosecutors in First Degree felony prosecutions. That scheme differs wildly from the six-figure (and, inevitably, seven-figure total) payment the District Court seeks to compel to the Special Prosecutors. A legitimate question exists regarding whether the District Court has the discretion to substitute its own judgment for that of the Commissioners Court in this context, as a result potentially usurping the legislative authority granted to the County Commissioners Court by TEX. GOV'T CODE. § 75.401(d).

Simply put, there are legitimate, good faith arguments that the Commissioners Court could and can still assert to dispute the authorization of future large—indeed, unprecedented—payments to the Special Prosecutors. Several legal avenues exist to pursue these arguments, and the Commissioners Court should consider all of them before simply agreeing to make any future payment.

III. Immediate Steps Forward

The most immediate step forward is to challenge Judge Gallagher's decision to order the payment of the Special Prosecutors' fees. There is a good faith basis to argue that these fees are unreasonable, especially in light of the failure of the District Court to identify any "unusual circumstances" permitting the Special Prosecutors to exceed the normally-available fees in this type of case by a multiple of thousands.

In terms of immediate appellate relief, the Commissioners Court should consider authorizing the combination of a motion to stay the order to pay and a petition for writ of mandamus to the Fifth District Court of Appeals at Dallas. The Commissioners Court should consider this both now and prior to any future payments.

Significantly, the discretion of the Commissioners Court to pursue such an appeal is not limited to bills which have already been paid or submitted to the Commissioners Court for consideration, but includes any potential future fee awards assuming the defects in the District Court's orders remain outstanding. However, the Commissioners Court should act promptly in order to ensure that it does not inadvertently waive any outstanding rights.

CONCLUSION

The fees of the Special Prosecutors wildly exceed those generally authorized by statute and the Collin County IDF. Prior to paying any future invoices, the Commissioners Court should carefully consider all its legal options, including a potential petition for writ of mandamus to the Fifth District Court of Appeals at Dallas.