



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 3, 2017

The Texas Constitution and sections 402.042 and 402.043 of the Government Code grant the attorney general authority to issue attorney general opinions. An attorney general opinion is a written interpretation of existing law. The development of an attorney general opinion is an involved and thorough process involving many layers of comprehensive review. Attorney general opinions do not necessarily reflect the attorney general's personal views, nor does the attorney general in any way "rule" on what the law should say. As have those that have come before it, this administration strives to craft opinions with the greatest level of legal accuracy and without any hint of impropriety.

By its very nature, the attorney general opinion process invites a variety of legal issues to be brought before our office for analysis and review. The questions asked are outside the scope of this office's control, and some of the questions to be addressed may raise actual or perceived conflicts of interest for the Attorney General and his staff. Consistent with applicable statutes and rules, staff members involved in the opinion process must recuse themselves from matters in which there may exist an actual or perceived conflict of interest. Accordingly, pursuant to section 402.001 of the Government Code, I delegate my signature authority in the attorney general opinion process to the First Assistant Attorney General, Jeffrey C. Mateer, for those opinions in which I may have an actual or perceived conflict of interest or in which my involvement gives even the appearance of impropriety. Any such opinion signed by the First Assistant under this delegation carries the full force of an attorney general opinion.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas



October 11, 2019

Ms. Terri Sellars
Wood County Auditor
Post Office Box 389
Quitman, Texas 75783-0389

Dear Ms. Sellars:

In the process of reviewing this matter, this office concludes there could be an actual or perceived conflict of interest such that the Attorney General has recused himself from any participation on the matter. Accordingly, pursuant to Government Code section 402.001 and the authority delegation issued by the Attorney General, the First Assistant Attorney General will sign this opinion. Any such recusal is intended to go beyond the letter and spirit of the governing law and rules in order to avoid even the appearance of impropriety and to demonstrate our ongoing commitment to the highest ethical standards.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeffrey C. Mateer", is written over the typed name.

JEFFREY C. MATEER
First Assistant Attorney General

JCM/som



October 11, 2019

Ms. Terri Sellars
Wood County Auditor
Post Office Box 389
Quitman, Texas 75783-0389

Opinion No. KP-0273

Re: Payment of district attorney pro tem
(RQ-0290-KP)

Dear Ms. Sellars:

You ask several questions related to the payment of a district attorney pro tem in Wood County (“County”).¹ Article 2.07 of the Code of Criminal Procedure provides a method for appointing an attorney pro tem when the district attorney “is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform.” TEX. CODE CRIM. PROC. art. 2.07(a).² In such a case, the court may appoint an attorney pro tem to perform the duties of the office. *Id.*

Your questions relate to two court orders purportedly appointing the same attorney to serve as pro tem in a single criminal matter. Request Letter at 1–3. The first order, dated March 16, 2017, recites that the court appointed a pro tem—with the consent of the district attorney—to “investigate” specific matters. *Id.* at Exhibit B. You tell us that at the time the court issued this order, the appointed attorney did not take or file an oath of office.³ *See id.* at 2. The second order, dated October 12, 2017, granted the district attorney’s motion to recuse and vested the pro tem with the authority to investigate, present to the grand jury, and prosecute any cases arising from the grand jury investigation. *Id.* at Exhibit C. Upon the issuance of the second order, the appointed attorney filed an oath of office. *See id.* at Exhibit D.

We begin with your second and fourth questions, which ask whether the County must compensate an attorney who assists with a prosecution without filing an oath of office and before the district attorney seeks recusal. *See id.* at 1–2. As an initial matter, your questions require a review of two related but distinct concepts—an attorney pro tem appointed under former article

¹*See* Letter from Ms. Terri Sellars, Wood Cty. Auditor, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (June 3, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²The Eighty-sixth Legislature enacted changes to Code of Criminal Procedure article 2.07 by amending and repealing certain subsections; however, the changes only apply to the appointment of an attorney pro tem that occurs on or after September 1, 2019. Act of May 22, 2019, 86th Leg., R.S., ch. 580, § 5, 2019 Tex. Sess. Law Serv. 1619, 1620 (hereinafter “S.B. 341”). This opinion refers to the former law in effect at the time the court appointed the pro tem. *See* Act of May 10, 1973, 63d Leg., R.S., ch. 154, § 1, 1973, Tex. Gen. Laws 356. Applicable subsections repealed by S.B. 341 are cited as “Former article 2.07.”

³We recite the facts you present, as this office cannot resolve questions of fact in the opinion process. *See* Tex. Att’y Gen. Op. No. GA-0648 (2008) at 7.

2.07 and a special prosecutor. Although these terms are sometimes used interchangeably and have similarities, the two positions fundamentally differ. *See State v. Rosenbaum*, 852 S.W.2d 525, 526 n.1 (Tex. Crim. App. 1993); *Stephens v. State*, 978 S.W.2d 728, 731 (Tex. App.—Austin 1998, pet. ref'd); Tex. Att’y Gen. Op. No. GA-0005 (2002) at 2. Former article 2.07 of the Code of Criminal Procedure governs the appointment and compensation of an attorney pro tem appointed prior to September 1, 2019, providing that the court may appoint a pro tem, who—after taking the constitutional oath of office—assumes the duties of the elected district attorney. *See* Former article 2.07(a), (c).⁴ As the pro tem serves when the district attorney is absent, disqualified, or otherwise unable to perform, the appointed attorney “assumes all the duties of the district attorney, acts independently, and, in effect, replaces the district attorney.” *Coleman v. State*, 246 S.W.3d 76, 82 n.19 (Tex. Crim. App. 2008); *see* TEX. CODE CRIM. PROC. art. 2.07(a). As such, the pro tem becomes the prosecuting attorney for an appointed case and “is legally authorized to do whatever the law authorizes a district attorney to do.” *State v. Lackey*, 35 Tex. 357, 358 (Tex. 1871).

In contrast, a special prosecutor assists with a case upon request of the district attorney but does not replace the prosecuting attorney. *Coleman*, 246 S.W.3d at 82 n.19. Rather, the district attorney maintains responsibility for managing the case but permits the special prosecutor to participate to the extent allowed by the prosecuting attorney. *Rosenbaum*, 852 S.W.2d at 529 (Clinton, J., concurring); *Stephens*, 978 S.W.2d at 731. As the district attorney retains control of the case, the special prosecutor need not take an oath of office, and court permission is not necessary. *Coleman*, 246 S.W.3d at 82 n.19; *Stephens*, 978 S.W.2d at 731. And, while former article 2.07(c) governs the compensation of an attorney pro tem, it does not address payment of a special prosecutor; instead, a special prosecutor’s compensation is a contractual matter. *See* Former article 2.07(c).

With this background, we turn to your question of whether the County must compensate an attorney who assists with a prosecution without taking the oath of office and who performs work before the district attorney seeks recusal. Request Letter at 1–2. An attorney who assists with a case prior to the district attorney’s recusal or other disqualification does not serve in the capacity of a pro tem. *See* TEX. CODE CRIM. PROC. art. 2.07(a) (providing for appointment of pro tem only when the district attorney is unable to perform, absent, or disqualified).⁵ Rather, an attorney who assists with the consent of the district attorney but prior to recusal serves in the capacity of a special prosecutor, rather than an attorney pro tem, and may qualify for compensation in that capacity. *See Rosenbaum*, 852 S.W.2d at 529 (Clinton, J., concurring); *Mai v. State*, 189 S.W.3d 316, 320 (Tex. App.—Fort Worth 2006, pet. ref'd) (concluding court-appointed attorney

⁴S.B. 341 repealed Texas Code of Criminal Procedure article 2.07(c). However, the former law continues to apply to pro tems appointed prior to September 1, 2019. *See* S.B. 341, § 5.

⁵Your question impliedly raises the issue of how to determine when a district attorney accomplishes recusal for purposes of discerning whether an appointee serves in the capacity of a pro tem or special prosecutor. A district attorney may file a motion for recusal with the court, and upon order of the court appointing a pro tem, the recusal is final. TEX. CODE CRIM. PROC. art. 2.07(a), (b–1); *see State v. Newton*, 158 S.W.3d 582, 587 (Tex. App.—San Antonio 2005, pet. dismiss’d). Recusal can also be implied when the district attorney consents to the trial court’s appointment of a pro tem. *See Newton*, 158 S.W.3d at 587; *State v. Ford*, 158 S.W.3d 574, 579 (Tex. App.—San Antonio 2005, pet. dismiss’d). However, the mere relinquishment of substantial portions of a case—including trial work—does not establish the district attorney’s recusal. *See Hartsfield v. State*, 200 S.W.3d 813, 817 (Tex. App.—Texarkana 2006, pet. ref’d).

served in capacity of special prosecutor when county attorney was not recused, absent, or disqualified).

Your questions stem from the March 2017 order issued prior to the district attorney's motion for recusal. *See* Request Letter at Exhibit B. The order states that the district attorney consents to the appointment of a pro tem; however, it specifies that the court is only appointing the pro tem to "investigate" certain matters. *Id.* Although the order uses the term attorney pro tem, it provides that the district attorney consents only to the appointee investigating a particular case and does not vest the appointee with any prosecuting authority nor suggest that the district attorney consents to the transfer of such authority. *See id.* This context, along with the appointee purportedly not taking the oath of office at that time, suggests the appointment of a special prosecutor rather than an attorney pro tem. *See Hartsfield*, 200 S.W.3d at 817 (noting that a prosecutor retains control of a prosecution when he or she has "control of crucial prosecutorial decisions, including . . . decisions regarding whether to prosecute"); *Mai*, 189 S.W.3d at 320 (concluding order appointed special prosecutor, rather than pro tem, when none of the requirements under article 2.07 were included in the order or record).

We next consider your first and third questions, which relate to the compensation of a pro tem upon the recusal of the district attorney. Former article 2.07(c) required a county to compensate an attorney pro tem who was not an attorney for the State "in the same amount and manner as an attorney appointed to represent an indigent person." Former article 2.07(c).⁶ Article 26.05 governs compensation for such appointed attorneys and provides that all compensation "shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county." TEX. CODE CRIM. PROC. art. 26.05(b). The article further requires that "[e]ach fee schedule adopted shall state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates." *Id.* art. 26.05(c). The County's fee schedule for appointed attorneys sets per-hour and flat rates for specified tasks; however, it also notes that the court "may adjust fees upward for extraordinary circumstances." Request Letter at Exhibit A.

You ask whether this provision allowing the court to opt out of the mandatory fee rates violates article 26.05. *See id.* at 1. Because article 26.05 requires a fee schedule to have reasonable fixed rates or minimum and maximum hourly rates, an opt-out provision permitting an award of fees outside of those parameters is invalid. *See* TEX. CODE CRIM. PROC. art. 26.05(c); *State ex rel. Wice v. Fifth Jud. Dist. Ct. App.*, No. WR-86, 920-02, 2018 WL 6072183, at **6-7 (Tex. Crim. App. Nov. 21, 2018). You additionally ask whether article 26.05 requires the County to pay an attorney pro tem a rate based on the opt-out provision when it exceeds the maximum rate set out in the fee schedule. Request Letter at 1. Article 26.05 mandates that a fee schedule have fixed rates or limits on fees and requires a commissioners court to pay fees that are "in accordance with the fee schedule for that county." TEX. CODE CRIM. PROC. art. 26.05(c). Accordingly, article 26.05 does not require a county to pay an attorney pro tem at rates exceeding statutory limits based on an invalid opt-out provision. *See id.*; *see Wice*, 2018 WL 6072183, at *4 ("By requiring the judges

⁶S.B. 341 repealed Texas Code of Criminal Procedure article 2.07(c). However, the former law continues to apply to pro tems appointed prior to September 1, 2019. *See* S.B. 341, § 5.

to set both minimum *and* maximum hourly rates, it is clear the legislature was concerned not only with attorneys receiving a fair rate of payment, but also with counties not being forced to pay excessive fees.”⁷

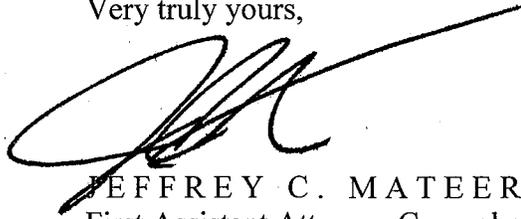
⁷The scope of this opinion is limited to prospective payments and does not address payments already made with approval from the commissioners court. If the judges of the County determine the fee schedule is unreasonable without the opt-out provision, they may create a new fee schedule that complies with article 26.05.

S U M M A R Y

An attorney who assists with a case prior to the district attorney's recusal or other inability to perform the duties of office serves in the capacity of a special prosecutor, rather than an attorney pro tem, and may qualify for remuneration in that capacity.

Upon the recusal of the district attorney, the court may appoint a pro tem. For an attorney pro tem appointed prior to September 1, 2019, the Texas Code of Criminal Procedure required a county to compensate the pro tem in accordance with a fee schedule stating reasonable fixed rates or minimum and maximum hourly rates. Given that the Legislature required limits on fees and prohibited payment outside of those limitations, a provision in a fee schedule permitting an award of fees outside of those parameters is invalid.

Very truly yours,



JEFFREY C. MATEER
First Assistant Attorney General of Texas

RYAN L. BANGERT
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

ASHLEY FRANKLIN
Assistant Attorney General, Opinion Committee