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AUG 25 2009

OPINION COMMITTEE

Lynda K. Russell

District Attorney
123rd Judicial District, Shelby County

FILE # ML-46151-09

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Kenneth B. Florence
Assistant District Attorney

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August 20, 2009

Don Clemmer
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RQ-0816-GA

RE: Attorney General Opinion Request - county or state payment of attorney's fees necessary and proper to defend elected District Attorney in a federal civil lawsuit under 42 USC 1983 (civil rights) for acts alleged to have been committed while the District Attorney was performing her official duties

Mr. Clemmer:

I am writing in order to request an attorney general opinion concerning: the payment of attorney fees and legal expenses to defend a local public official in a civil lawsuit. The lawsuit's averments involve alleged acts occurring within the course and scope of the public official's duties.

As required, a brief concerning this matter is enclosed.

Thank you in advance for your cooperation in this matter, and please do not hesitate to call if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ken Florence".

Kenneth B. Florence
Assistant District Attorney
Shelby County, Texas

Brief regarding county or state payment of attorney's fees necessary and proper to defend elected District Attorney in a federal civil lawsuit under 42 USC 1983 (civil rights) for acts alleged to have been committed while the District Attorney was performing her official duties

Facts:

The elected district attorney has been named a defendant in a federal civil rights lawsuit filed under 42 USC 1983. It has been alleged that the district attorney deprived plaintiffs of their civil rights under color of state law by actions she took in the course and scope of performing her official duties. Although the case is civil in nature, the acts complained of could lead to the filing of misdemeanor criminal charges.

The county commissioners do not wish to authorize the expenditure of funds to mount a defense for the district attorney in the civil case. The commissioners have authorized a defense for two other named county public official defendants, but have disclaimed funds for the district attorney's legal defense. The commissioners' position is that the district attorney is not a county employee due to the fact that her *total* compensation comes from the State of Texas and not from county funds.

The attorney general has likewise disclaimed representation and indemnification after a proper and timely request. (Exhibit "1" request letter and Exhibit "2" refusal letter from David S. Morales, Deputy Attorney General for Civil Litigation).

Issues:

- I. Can the county commissioners refuse to pay for the district attorney's necessary and proper attorney's fees and other legal expenses incurred in defending a civil lawsuit? Or stated alternatively, does the county have a duty to defend the elected district attorney in a civil lawsuit arising out of the performance of her official duties?

- II. Is the State of Texas required by law to pay attorney fees and court costs incurred by the district attorney when the attorney general has refused to provide a defense despite an official request?

- III. May the district attorney use asset forfeiture monies to pay for her civil legal defense, if the both the State and the County neglect to defend and indemnify her, as monies used for an "official purpose?"

- IV. What indemnification protections, if any, do district attorney support staff have if they are sued civilly for alleged actions or failures to act undertaken in conjunction with the performance of their official duties?¹ (Not addressing sovereign immunity, but indemnification for attorney's fees that may be required to assert the doctrine).

¹The writer concludes this issue is fairly subsumed in the arguments listed for I-III, and accordingly, this issue is not separately briefed *infra*.

Issue 1

Can the county commissioners refuse to pay for the district attorney's necessary and proper attorney's fees and other legal expenses incurred in defending a civil lawsuit? Or stated alternatively, does the county have a duty to defend the elected district attorney in a civil lawsuit arising out of the performance of her official duties?

Law

"Any duty a county has to provide counsel to its officials and employees must be based on the Texas Constitution and statutes." *White v. Eastland County*, 12 S.W.3d 97, 100 (Tex.App.—Eastland 1999, no pet.). The Texas Local Government Code provides for the employment of counsel. TEX. LOCAL GOVT. CODE § 157.901. That section provides that any county official or employee sued for an action arising from the performance of a public duty is entitled to be represented by the district attorney or the county attorney. TEX. LOCAL GOVT. CODE § 157.901(a). 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. TEX. LOCAL GOVT. CODE § 157.901.(b). The private counsel countenanced by section (b) is for the civil case and not for the criminal case. *White*, 12 S.W.3d at 102. *See also* Tex. Att'y Gen. Op. No. JC-0047, P. 2 (1999)(section 157.091 of the Local Government Code entitles county officials and employees to legal representation in certain circumstances).

Application of Law to Facts:

The specific holding of *White*, is that the county is not required to provide legal counsel in the criminal arena. However, the language in *White*, as well as the plain language of TEX. LOCAL

GOVT. CODE § 157.901 mandate the county provide legal counsel in the civil case. Furthermore, as the official implicated in this case is the district attorney, subsection (b) of the statute, which requires that additional counsel be hired when “necessary and proper” is applicable.

In this particular case, the county attorney may not provide the representation under §157.901(a) because the civil act complained of could in fact lead to misdemeanor criminal charges of Abuse of Official Capacity, Penal Code § 39.02. As such, the county attorney with misdemeanor criminal jurisdiction has a potential conflict of interest such that he cannot be assigned to handle the civil case.

White, supra, is the only reported case the writer has found having the similar fact wherein the county official is seeking to force the county to provide legal representation. The cases that have heretofore arisen in Texas have dealt with the county’s discretion to provide counsel, not its discretion to deny counsel. *See e.g.*, Tex. Att’y Gen. Op. No. JC-0294, P. 4 (2000)(“This office has written numerous opinions on the payment of public servants’ legal expenses in civil cases brought against them individually.”); Tex. Att’y Gen. Op. No. DM-488 (1998)(“finally made it clear that a political subdivision could reimburse an officer or employee for legal expenses incurred in a suit challenging actions taken within the scope of his or her official authority.” as analyzed by Tex. Att’y Gen. Op. No. JC-0294, P. 6). The opinion in JC-0294 quoted *White* with approval: “The Texas Legislature has addressed the problem of frivolous lawsuits against county employees and their cost of counsel in Section 157.901 [of the Local Government Code].” JC-0294 at P. 7-8 (citing *White*, 12 S.W.3d at 104).

Issue 2

Is the State of Texas required by law to pay attorney fees and court costs incurred by the district attorney when the attorney general has refused to provide a defense despite an official request?

Law

The attorney general has determined that a district attorney is a district officer and not a county officer. Tex. Att’y Gen. Op. No. MW-252 (1980); Tex. Att’y Gen. Op. No. H-656 (1975). As such, it may be concluded that the county cannot be required to fund the defense. Tex. Att’y Gen. Op. No. MW-252 at P. 2. However, the state has provided that “any other officer of a state agency, institution, or department” is entitled to representation under the circumstances present in this case. TEX. CIV. PRAC. & REM. CODE § 104.001, 104.0035. The officer must make a request for representation or indemnification to the attorney general. *Id.* at 104.0035(d). An aggrieved requestor can file suit in the District Court of Travis County, from which determination no appeal lies. *Id.* at 104.0035(e), (f).

Application of Law to Facts:

In MW-252, the attorney general concluded that the State would not be required to fund the defense because the district official (judge) had not made an official request for representation. *Id.* at P. 2. However, in this case, the district attorney made an official request only four days after suit was filed (Exhibit “1”), but the attorney general denied representation in a written letter (Exhibit “2”). Accordingly, the district attorney has complied with the state statutory requirement for a state duty to defend and indemnify. TEX. CIV. PRAC. & REM. CODE § 104.0035. If the attorney general concludes that the county is not obligated to indemnify and defend, the attorney general should conclude that the State of Texas is so obligated.

Issue 3

May the district attorney use asset forfeiture monies to pay for her civil legal defense, if both the State and the County neglect to defend and indemnify her, as monies used for an “official purpose?”

Law

The code of criminal procedure provides that asset forfeiture monies may be used for “the official purposes of the attorney representing the state or for law enforcement purposes.” TEX. CODE OF CRIM. PROC., art. 59.06(c)(1), (h); Tex. Att’y Gen. Op. No. GA-259 (2004)(monies can be used for an elected prosecutor’s own office).

Application of Law to Facts

When the elected prosecutor has been sued civilly for acts done while in the performance of her official duties, it cannot reasonably be argued that the defense expenditure is anything but an “official purpose.” This is especially so when the county and the State disclaim a duty to defend and indemnification. The attorney general should conclude that the expenditure of asset forfeiture monies to defend a civil lawsuit for acts alleged to have occurred in the course and scope of a prosecutor’s official duties is an “official purpose”, and therefore, the expenditure of asset forfeiture monies in this fashion is proper.

Conclusion:

The county should be required to fund the civil defense in this case. The statutory and case law support a conclusion that the county is required to fund the civil defense of the district attorney. Additionally, it would be inequitable for the county to pick and choose which county officials it will support in a case — it should either defend all or defend none. It is worth noting that there is undoubtedly a legitimate local government interest in the litigation, and not just the district

attorney's own private personal interest, as the county may be the proverbial deep pocket. However, one cannot expect the county commissioners to make the required finding of a county interest due to that bodies' collective reticence in assisting the district attorney in the first place.

If the county is not required to indemnify and defend the district attorney, the State of Texas should be so required. If the district attorney is not a county officer, then she is a state officer. She should be accorded representation and indemnification under TEX. CIV. PRAC. & REM. CODE § 104.0035.

Finally, if the county and the State fail to support the district attorney, the attorney general should conclude that the use of asset forfeiture monies for the civil legal defense of the district attorney is an "official purpose" for usage and expenditure of said forfeiture monies.

Public policy is germane and implicated in this request for an opinion—If the county commissioners fail to support the district attorney in this matter and so does the State of Texas, then it will send a message throughout the State that public service can be detrimental to your personal financial well-being. The result will be that no competent lawyer will be willing to undertake public service as an elected district attorney.

The elected district attorney of Shelby County is seeking an attorney general opinion setting forth the requirement that the county or the State fund her legal defense in a civil case arising out of acts she took in fulfilling the scope of her duties. Only in the alternative, the district attorney's use of asset forfeiture monies to fund her civil legal defense should be permitted. The attorney general should likewise address indemnification as it relates to district attorney staff members for acts committed or omitted in the course and scope of their official duties.

Respectfully Submitted,

LYNDA K. RUSSELL

District Attorney

TB# 00789600

KENNETH FLORENCE

Assistant District Attorney

TB# 00790698

BY:



State's Attorney

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Bethany S. Stephens
Assistant District Attorney

Danny Green
Chief Investigator

November 11, 2008

David Morales
Deputy Attorney General for Litigation
Texas Attorney General's Office
Austin, TX

RE: Civil Action No. 2:08cv288
U.S. District Court for the Eastern District of Texas
Marshall Division
James Morrow, et al
vs.
City of Tenaha Deputy City Marshall Barry Washington, et al

VIA FAX

Dear Mr. Morales:

Transmitted herewith is Plaintiff's First Amended Complaint filed in the above referenced action. I am one of the Defendants named in the complaint, both in my official capacity as well as an individual. I was told by TDCAA and my County Attorney that the Attorney General's office represented District Attorneys in cases such as this. I received this lawsuit in the mail on Thursday, November 6.

Please consider this letter as an official request to represent me, and, if the Attorney General does not provide counsel to notify me as soon as possible in that I am required to answer the suit within 20 days.

Thank you for your consideration.

Sincerely,


Lynda K. Russell

Exhibit "1"



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2008

received
11-17-08

DAVID S. MORALES
DEPUTY ATTORNEY GENERAL FOR CIVIL LITIGATION
DIRECT DIAL: (512) 936-2986

Ms. Lynda K. Russell
Shelby County District Attorney
200 San Augustine Street, Suite 12
Center, Texas 75935

Re: *James Morrow, et al. v. City of Tenaha Deputy City Marshall Barry Washington, et al.*; Cause No. 2:08cv288

Dear Ms. Russell:

We are in receipt of your letter dated November 10, 2008, requesting representation in the above-referenced matter. I understand that David Talbot, Chief of our Law Enforcement Defense Division, contacted you and advised you that under the circumstances of this case, we are not able to extend representation to you.

Please feel free to contact me if you have any questions regarding this matter.

Sincerely,

David S. Morales
Deputy Attorney General for Civil Litigation

DSM/lr

cc: David Talbot, Chief, Law Enforcement Defense Division

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Exhibit 2