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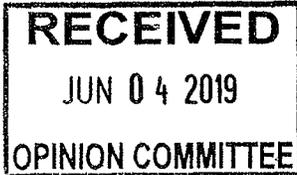
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I.D. # 48566

June 3, 2019

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

VIA EMAIL TRANSFER
opinion.committee@oag.texas.gov

Re: Request for Opinion regarding payment of district attorney *pro tem*

Dear General Paxton:

This law firm represents Wood County, Texas and Wood County Auditor Terri Sellars regarding this request for an Attorney General's Opinion. Auditor Sellars respectfully requests an Attorney General Opinion from your office on the following matters:

1. Does CODE OF CRIMINAL PROCEDURE § 26.05(c) require the County to pay a District Attorney *pro tem* \$275.00 per hour when the County's Fee Schedule calls for \$75.00 per hour?
2. Does CODE OF CRIMINAL PROCEDURE §§ 2.07(c) and 26.05(c) require the County to pay a person for work performed after he was appointed as District Attorney *pro tem*, but before the elected District Attorney was recused, and before the person took the oath of office and filed it with the clerk of the court?
3. Does the opt-out provision in Wood County's Fee Schedule run afoul of the plain language of Article 26.05 of the CODE OF CRIMINAL PROCEDURE?

4. Does the law require the County to pay a District Attorney *pro tem* for work performed in cases in which the order appointing the *pro tem* and/or the oath of office were not filed with the clerk of the court?

I. BACKGROUND INFORMATION

On January 1, 2014, District Judge G. Timothy Boswell and County Judge Bryan Jeanes entered an Amended Standing Order Regarding Fee Schedule for Court-Appointed Attorneys in Wood County, Texas (“Fee Schedule”). See Exhibit A. In relevant part, the Fee Schedule calls for court-appointed attorneys in non-capital felony cases, disposed of by trial, to be paid \$75.00 per hour. *Id.* The Order allows payment of all hours actually spent in trial, plus an equal number of additional hours for trial preparation. *Id.* The Fee Schedule contains a note on the bottom that reads, “The Court may adjust fees upward for extraordinary circumstances!” *Id.*

A. Time Period in Which Joe Shearin Worked as District Attorney Pro Tem Before District Attorney Jim Wheeler was Recused and Before Shearin Took and Filed an Oath of Office

On March 16, 2017, District Judge Jeff Fletcher entered an “Order Appointing Attorney Pro Tem” which appointed Joe Shearin¹ (“Shearin”) as District Attorney *pro tem* to “investigate matters related to the shooting of William Forrester, et al.” See Exhibit B. The Order did not set forth the rate at which Shearin or his investigator were to be paid. See *Id.* At the time this Order was entered, former DA Jim Wheeler was neither recused, absent, disqualified, nor otherwise unable to perform the duties of his office. Shearin did not file a *pro tem* oath of office with the clerk of the court.

¹ At all times relevant, Joe Shearin was not an attorney for the state. The Texas Bar website identifies Mr. Shearin as a solo practitioner in private practice.

During this time period, Joe Shearin presented a criminal case against William Tucker to the Grand Jury and Tucker was indicted on six counts. For work performed during this time period – when Shearin worked as a *pro tem*, before the DA was recused and before Shearin took and filed an Oath of Office – Shearin submitted invoices to Wood County reflecting a rate of \$275.00 per hour and totaling \$83,027.18.

B. Time Period in Which Joe Shearin Worked as District Attorney *Pro Tem* After District Attorney Jim Wheeler was Recused and After Shearin Took and Filed an Oath of Office

On October 12, 2017, Judge Fletcher entered a second “Order Appointing District Attorney Pro Tem.” See Exhibit C. The Order granted the State’s Motion to Recuse and appointed Joe Shearin as DA *Pro Tem* to:

Investigate and present to the grand jury any criminal offenses relating to the use of certain lands in Wood County owned by James Brown and/or Jerry Boone, including assaults on John Winston Forrester, John Philipp Forrester, et al in October and/or November, 2015, and including any offenses relating to misconduct by county employees.

Id.

On the same date, Joe Shearin signed an “Oath of Office” as Wood County DA *pro tem*. See Exhibit D. The Oath did not identify a cause number and is not filed in the records of the clerk of the court. This order, like the first, did not set forth the rate at which Shearin or his investigator were to be paid.

For work performed during this time period, Shearin submitted invoices to Wood County reflecting a rate of \$275.00 per hour and totaling \$249,063.02.

II. LEGAL AUTHORITIES

A. District Attorney Pro Tem

A “district attorney *pro tem*” is appointed by the district court after a district attorney has voluntarily recused himself from a case, or is absent, disqualified, or otherwise unable to perform the duties of his office. See TEX. CODE CRIM. PRO. § 2.07; *see also Coleman v. State*, 246 S.W.3d 76, 81-2 (Tex. Crim. App. 2008). After taking the oath of office, an attorney *pro tem* assumes the duties of the elected district attorney and “in effect replaces the latter in performing germane functions of the office for purposes contemplated by the appointment.” *State v. Rosenbaum*, 852 S.W.2d 525, 529 (Tex. Crim. App. 1993) (Clinton, J., concurring); see TEX. CODE CRIM. PRO. § 2.07 (attorney *pro tem* must file oath with clerk); *Rogers v. State*, 956 S.W.2d 624, 627 (Tex. App. — Texarkana 1997, pet. ref’d)(delay in filing oath with clerk a “mere irregularity” that did not deprive attorney *pro tem* of authority to act). The decision of whom to appoint as an attorney *pro tem* lies within the discretion of the trial court, the only statutory limitation being that the court must appoint a “competent attorney.” *Shea v. State*, 167 S.W.3d 98, 101 (Tex. App. — Waco 2005, pet. ref’d). A “competent attorney” is a member in good standing with the State Bar. *Id.* at 102.

B. Rate of Payment of District Attorney Pro Tem

In the event an appointed *pro tem* is not already an attorney for the state, as in this matter, “he shall be compensated as an attorney appointed to represent an indigent person.” See TEX. CODE CRIM. PRO. § 2.07. All payments made to attorneys representing indigent criminal defendants shall be paid in accordance with a schedule of fees adopted by formal action of a judge trying criminal cases in the County. TEX. CODE CRIM. PRO. §

26.05. A copy of the fee schedule is to be sent to the Commissioners' Court of the County. *Id.* Each 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 rates. *Id.* "All payments made under this article shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court." *Id.*

The Texas Court of Criminal Appeals recently considered a Fee Schedule that included a section stating, "The judge presiding over a case may authorize payment to appointed counsel that varies from the fee schedule in unusual circumstances... ." *State ex rel. Wice v. Fifth Judicial Dist. Court of Appeals*, WR-86,920-02, 2018 WL 6072183, at *3 (Tex. Crim. App. Nov. 21, 2018). The *Wice* Court held that such an "opt-out" provision runs afoul of the statutory limitation that the fee either be fixed or between the minimum and maximum hourly rates. *Id.* at *4; see TEX. CODE CRIM. PRO. § 26.05.

The *Wice* Court vacated the trial court's order to pay the invoices and ordered the trial court to enter a new order for payment of the fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure. *Id.* at *8-9. See *Wice*, 2018 WL 6072183.

C. Relevant Statutes

Texas Code of Criminal Procedure, Art. 2.07. ATTORNEY PRO TEM.

(a) Whenever an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of his office, or in any instance where there is no attorney for the state, the judge of the court in which he represents the state may

appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state.

* * *

(c) 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.

(d) In this article, "attorney for the state" means a county attorney, a district attorney, or a criminal district attorney.

Texas Code of Criminal Procedure, Art. 26.05. COMPENSATION OF COUNSEL
APPOINTED TO DEFEND.

(a) A counsel, other than an attorney with a public defender's office or an attorney employed by the office of capital and forensic writs, appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel:

(1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;

(2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;

(3) preparation of an appellate brief and preparation and presentation of oral argument to a court of appeals or the Court of Criminal Appeals; and

(4) preparation of a motion for rehearing.

(b) All payments made under this article 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. On adoption of a schedule of fees as provided by this subsection, a copy of the schedule shall be sent to the commissioners court of the county.

(c) Each 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, and shall provide a form for the appointed counsel to itemize the types of services performed. No payment shall be made under this article until the form for itemizing the services performed is submitted to the judge presiding over the proceedings or, if the county operates a managed assigned counsel program under Article 26.047, to the director of the program, and until the judge or director, as applicable, approves the payment. If the judge or director disapproves the requested amount of payment, the judge or director shall make written findings stating the amount of payment that the judge or director approves and each reason for approving an amount different from the requested amount. An attorney whose request for payment is disapproved or is not otherwise acted on by the 60th day after the date the request for payment is submitted may appeal the disapproval or failure to act by filing a motion with the presiding judge of the administrative judicial region. On the filing of a motion, the presiding judge of the administrative judicial region shall review the disapproval of payment or failure to act and determine the appropriate amount of payment. In reviewing the disapproval or failure to act, the presiding judge of the administrative judicial region may conduct a hearing. Not later than the 45th day after the date an application for payment of a fee is submitted under this article, the commissioners court shall pay to the appointed counsel the amount that is approved by the presiding judge of the administrative judicial region and that is in accordance with the fee schedule for that county.

(d) A counsel in a noncapital case, other than an attorney with a public defender's office, appointed to represent a defendant under this code shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with prior court approval shall be reimbursed in the same manner provided for capital cases by Articles 26.052(f) and (g), and expenses incurred without prior court approval shall be reimbursed in the manner provided for capital cases by Article 26.052(h).

* * *

(f) All payments made under this article shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court.

III. QUESTIONS

1. Does CODE OF CRIMINAL PROCEDURE § 26.05(c) require the County to pay a District Attorney *pro tem* \$275.00 per hour when the County's Fee Schedule calls for \$75.00 per hour?

2. Does CODE OF CRIMINAL PROCEDURE §§ 2.07(c) and 26.05(c) require the County to pay a person for work performed after he was appointed as District Attorney *pro tem*, but before the elected District Attorney was recused, and before the person took the oath of office and filed it with the clerk of the court?
3. Does the opt-out provision in Wood County's Fee Schedule run afoul of the plain language of Article 26.05 of the CODE OF CRIMINAL PROCEDURE?
4. Does the law require the County to pay a District Attorney *pro tem* for work performed in cases in which the order appointing the *pro tem* and/or the oath of office were not filed with the clerk of the court?

Thank you for your consideration of this important matter. Please do not hesitate to contact me with any questions or requests for additional information. I can be reached at the numbers above or by email at rsd@flowersdavis.com. You may also contact my partner, Lee I. Correa, lic@flowersdavis.com.

Submitted by,



Terri Sellars
Wood County Auditor

REPRESENTED BY:



Robert S. Davis

TS/rsd/lc
Enclosures

cc: Hon. Lucy Hebron
Wood County Judge

Angela Albers
Wood County District Attorney

Joe Shearin
Wood County *Pro Tem*

