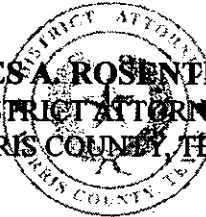


CHARLES A. ROSENTHAL, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS



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APR 15 2004

OPINION COMMITTEE

April 12, 2004

Mr. Greg Abbott
Attorney General of Texas
300 W. 15th Street
Austin, Texas 78701

FILE # ML-43634-04
I.D. # 43634

RQ-0211-GA

Dear Mr. Abbott:

Pursuant to Section 402.403 of the Government Code, I request your written opinion on the following questions:

Does Chapter 59 of the Code of Criminal Procedure authorize the attorney representing the state to transfer forfeited property to his own office where the transfer is in accordance with accepted accounting practices and in accordance with the provisions of a local agreement between the attorney representing the state and the seizing law enforcement agencies detailing the methods by which the attorney may administer and dispose of property?

Is a district attorney's office a "law enforcement agency" for purposes of the transfer of forfeited property pursuant to Chapter 59 of the Code of Criminal Procedure?

These questions have arisen in the course of litigation involving the State of Texas in which assets seized under the authority of Chapter 59 of the Code of Criminal Procedure are forfeited and disposed. Specifically, in Harris County, vehicles or other items such as furniture, jewelry, and computer equipment are seized by law enforcement agencies, including peace officers of the District Attorney's Office, and forfeited by the court as contraband. Said items have been either sold at auction, transferred to the law enforcement agency that seized the property, including the Harris County District Attorney's Office, or transferred to the District Attorney's Office "to maintain, repair, use, and operate the property for official purposes . . ." pursuant to the local agreement between the law enforcement agency and the Harris County District Attorney's Office. See TEX. CODE CRIM. PROC. ANN. art. 59.06(b) (Vernon Supp. 2004).

Hon. Greg Abbott
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Please find attached a brief on the merits of each question. I look forward to your opinion on these important issues of law.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles A. Rosenthal, Jr.", written in a cursive style.

Charles A. Rosenthal, Jr.
Harris County District Attorney
(713) 755-5810

Enclosure,
CAR/sd

**Brief in Support of Charles A. Rosenthal, Jr.'s
April 10, 2004 Request for Attorney General Opinion**

A. Questions Presented

1. May the attorney representing the state transfer forfeited property to his own office where the transfer is in accordance with accepted accounting practices and in accordance with the provisions of a local agreement between the attorney representing the state and the seizing law enforcement agencies detailing the methods by which the attorney may administer and dispose of property?
2. Is a district attorney's office a "law enforcement agency" for purposes of the transfer of forfeited property?

B. Analysis

The transfer of forfeited property to a district attorney's office is not foreclosed by Chapter 59 of the Code of Criminal Procedure, or by Texas Attorney General Opinion No. GA-0122.

1. Texas Attorney General Opinion No. GA-0122

The uncertainty in the law giving rise to this opinion request arose from language in Texas Attorney General Opinion No. GA-0122 (November 18, 2003) (hereinafter "GA-0122"). Thus, a brief recap of that opinion is appropriate.

GA-0122 was prompted by an inquiry from Antonio Sandoval, Hidalgo County Auditor, about the district attorney's obligations as administrator of forfeited real property. Specifically, Mr. Sandoval asked:

Does [the local agreement between the Hidalgo County criminal district attorney's office and DPS] satisfy the provisions of Article 59.06(a) of the Code of Criminal Procedure, in that the District Attorney does not have to sell the [forfeited] property on the 75th day after the date of the final judgment of forfeiture of this property?

Is the District Attorney authorized to lease the aforementioned [forfeited] property? . . .

Is the District Attorney in compliance with the state statu[t]es by holding the property for ' . . . law enforcement . . . ' before selling the

property and distributing the proceeds as agreed to in the Local Agreement (Exhibit A)? If the answer to this question is yes, is there a maximum amount of time the property can be held?

GA-0122 at 2.

Your office reached the following conclusions:

An attorney representing the state must administer property forfeited under chapter 59 of the Code of Criminal Procedure consistent with accepted accounting practices and with the terms of any local agreement with a law enforcement agency. Forfeited property subject to a local agreement must ultimately be disposed of by sale or transfer of the property to a law enforcement agency, but there is no statutory deadline for the disposition. There is no statutory deadline for disposing of forfeited property subject to a local agreement. An attorney representing the state may lease forfeited property only if the lease is consistent with the local agreement and with the attorney's statutory duties to ultimately dispose of property by transfer or sale and to distribute any proceeds under article 59.06 of the code. Forfeited property subject to administration under article 59.06(a) of the code is state property. The attorney representing the state need not obtain approval from the county commissioners court or the state to execute a lease within the attorney's authority to administer forfeited property under article 59.06(a). Statutory bidding requirements do not apply to such an attorney's authority to administer forfeited property. To the extent forfeited property is exempt from ad valorem taxation, the attorney representing the state need not apply for an exemption for it to be effective.

GA-0122 at 5-6.

GA-0122 left many questions unresolved. For example, it was unclear whether its conclusions concerning the manner in which the attorney representing the state may dispose of property – namely by sale or transfer to a law enforcement agency – apply to *all* types of property and *all* district and county attorney offices, *or* do they apply only to situations factually similar to the one the Hildago County Auditor references, in which (1) property was leased following forfeiture, and (2) there was no local agreement in existence detailing the methods by which the attorney could administer and dispose of forfeited real property. Moreover, the opinion leaves unanswered whether the office of an attorney representing the state can be a "law enforcement agency" for purposes of Chapter 59.

2. *Forfeited Property Properly Transferred to District Attorney Pursuant to Local Agreement and Accepted Accounting Practices*

In Harris County, cases arise where vehicles or other items such as furniture, jewelry, and computer equipment are seized by law enforcement agencies, including peace officers employed by the District Attorney's Office, and forfeited by the court as contraband. Said items have been either sold at auction, transferred to the law enforcement agency that seized the property, including the Harris County District Attorney's Office, or transferred to the District Attorney's Office "to maintain, repair, use, and operate the property for official purposes . . ." pursuant to the local agreement between the law enforcement agency and the Harris County District Attorney's Office. *See* TEX. CODE CRIM. PROC. ANN. art. 59.06(b) (Vernon Supp. 2004).

Article 59.06 outlines the procedures by which forfeited property is disposed, depending upon whether or not there is a local agreement between the attorney representing the state and the seizing law enforcement agency. Article 59.06(a) states that if there is no local agreement, then the forfeited "property shall be sold on the 75th day after the date of the final judgment of forfeiture at public auction . . ." TEX. CODE CRIM. PROC. ANN. art. 59.06(a) (Vernon Supp. 2004). However, "[i]f a local agreement exists between the attorney representing the state and law enforcement agencies, the attorney representing the state *may* transfer the property to law enforcement agencies . . ." Art. 59.06(b) (emphasis added). In addition, "[i]f a local agreement exists between the attorney representing the state and law enforcement agencies, all money, securities, negotiable instruments, stocks or bonds, or things of value, or proceeds from the sale of those items, shall be deposited, . . ." TEX. CODE CRIM. PROC. ANN. art. 59.06(c) (Vernon Supp. 2004). Thus, Article 59.06 outlines three provisions, dependent upon whether or not there is a local agreement, to guide the attorney representing the state in disposing of seized property.

GA-0122 states:

If the attorney has entered into a local agreement with a law enforcement agency, however, the attorney has two principal options. The attorney may convey forfeited property to the law enforcement agency, . . . [or] pursuant to the local agreement, the attorney shall, after deducting certain costs, deposit 'all money, securities, . . .' into special funds to benefit the attorney's office and the appropriate law enforcement agency,

GA-0122 at 2.

However, Articles 59.06(b) and (c) appear to offer more than two options to an attorney representing the state when a local agreement has been entered into with a law enforcement agency. Specifically, Article 59.06(b) states that the attorney “may” transfer the property, as opposed to sections (a) and (c) which state that the attorney “shall” engage in certain conduct. The permissive implication of “may” opens the door to other methods of disposal.

The forfeiture statute does not exclude the option of the attorney representing the state to transfer the property to his office. In fact, Subsection (g)(1) implicitly recognizes the right of an attorney representing the state to receive proceeds and property. *See* TEX. CODE CRIM. PROC. ANN. art. 59.06(g)(1) (Vernon Supp. 2004) (“agencies and attorneys . . . who receive proceeds or property under this Chapter”) If it were not permissible for the attorneys to also receive property, then section (g)(1) would not include a provision for the attorney to account for the “seizure, forfeiture, receipt, and specific expenditure of all such proceeds and property.” *Id.*

A fair reading of Article 59.06(b) accords an attorney representing the state the option to *not* transfer property to a law enforcement agency. In contrast to Sandoval’s case, the local agreements between the Harris County District Attorney’s Office and law enforcement agencies detail the methods by which property and proceeds will be disposed. *See* Attachment A (copy of local agreement). For example, part three of the local agreement, entitled “Disposition of Forfeited Property,” details the manner in which real and personal property, as well as money, securities, negotiable instruments, and stocks are to be disposed. Specifically, the local agreement states:

2. The District Attorney may transfer said property to any agency or political subdivision employing peace officers if:
 - A. [the agency] has notified the District Attorney in writing that [the agency] does not want to use or operate the property and will waive [the agency’s] seventy percent (70%) interest in the property pursuant to Chapter 59 of the Texas Code of Criminal Procedure and this agreement, or
 - B. [the agency] notified the District Attorney within sixty (60) days of the date of seizure of the percentage of interest that any other agency may have in the property. The specific percentages of interest that each agency has in the property should be included in the form of a “Use Letter” addressed and delivered to the District Attorney, or

- C. [the agency] has not notified the District Attorney within sixty days (6) of the date of seizure of [the agency's] desire to use such property for official purposes in the form of a "Use Letter" addressed and delivered to the District Attorney.

See Attachment A at 3. The local agreement further states:

3. Three out of every ten motor vehicles shall be forfeited to the District Attorney for official use and operation, unless expressly waived by the District Attorney's Office.

Id. at 4. The Harris County District Attorney employs peace officers, thus falling into the category of an agency to whom property can be transferred if the above three provisions are met. In addition, the local agreement specifically states that some vehicles will be forfeited to the district attorney's office.

There are safeguards against abuses in the administration of the forfeited property by an attorney representing the state. Article 59.06(a) states that the attorney representing the state shall administer forfeited property "in accordance with accepted accounting practices and with the provisions of any local agreement entered into between the attorney representing the state and law enforcement agencies." Texas Attorney General Opinion No. JC-0075 states that "as long as you administer the property in accordance with accepted accounting practices and with the provisions of your local agreement, you have the discretion to decide how to dispose of it most advantageously." See Tex. Att'y Gen. Op. No. JC-0075 at 1 (1999).

If the local agreement between the attorney representing the state and the law enforcement agency details the methods of disposal of property to the attorney and if the attorney representing the state follows accepted accounting practices, it necessarily follows that that the attorney representing the state may transfer such property to his office in compliance with Article 59.06.

3. Office of District Attorney as "Law Enforcement Agency"

Alternatively, a district attorney's office may receive forfeited property as a "law enforcement agency." A district attorney's office fits the description of a "law enforcement agency" as defined under 59.01(5). See TEX. CODE CRIM. PROC. ANN. art. 59.01(5) (Vernon Supp. 2004) (defining "law enforcement agency" as "an agency of the state or an agency of a political subdivision of the state authorized by law to employ peace officers").

C. Conclusion

It is the opinion of the Harris County District Attorney that Chapter 59 of the Code of Criminal Procedure does not foreclose the transfer of forfeited property to the office of the attorney representing the state, so long as the transfer is in accordance with accepted accounting practices and in accordance with the provisions of a local agreement between the attorney representing the state and the seizing law enforcement agencies.

Moreover, it is the opinion of the Harris County District Attorney that prosecutorial offices are "law enforcement agencies" for purposes of Chapter 59 of the Code of Criminal Procedure.