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February 16, 2016

ATTORNEY GENERAL OPINION NO. 2016- 2

Paul F. Kitzke
Stevens County Attorney
1024 S. Trindle, P. O. Box 909
Hugoton, KS 67951-0909

Re: Counties and County Officers—County Attorney—Duties

Counties and County Officers—County Attorney—Absence or Disability;
Appointment by Court

Counties and County Officers—County Attorney—County Commissioners
Authorized to Hire Additional Counsel

Courts—District Courts—County Commissioners Responsible for Certain
Expenses of District Court Operations

Synopsis: When a board of county commissioners appoints an acting county attorney pursuant to K.S.A. 19-723, the county compensates such attorney from its general funds. When a court appoints an acting county attorney pursuant to K.S.A. 19-711, the county, with the cooperation of the chief judge, compensates such attorney from the funds for the operation of the district court if the county has not adopted a different system. Cited herein: K.S.A. 19-702; 19-706b; 19-711; 19-723; 20-348; K.S.A. 2015 Supp. 20-349.

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Dear Mr. Kitzke:

As the County Attorney for Stevens County, you have asked our office for an opinion regarding the payment of an acting county attorney.¹ You advise, because you also have a private practice, there are instances where you have an ethical conflict of interest based upon either professional or personal reasons and have to use the services of an acting county attorney. However, the budget for the Office of the Stevens County Attorney does not include any moneys for an acting county attorney. You ask whether the fees for an acting county attorney are paid from your salary as the Stevens County Attorney or the county's general fund.

K.S.A. 19-701 *et seq.* contains the general law regarding county attorneys. The duties of a county attorney are stated in K.S.A. 19-702(a):

"Except as otherwise provided in this section,² it shall be the duty of the county attorney to appear in any court having jurisdiction within the county and prosecute or defend on behalf of the people all actions and proceedings, civil or criminal, in which the state or the county is a party or interested."

K.S.A. 19-706b governs the funds for the office of the county attorney. It provides in pertinent part:

The board of county commissioners of any county having a population of not more than one hundred thousand (100,000) may allow to the office of the county attorney of such county such reasonable sums for salaries and compensation which will permit said county attorney to appoint such deputies and assistants as are necessary to properly expedite the business of his office. Said deputies and assistants shall have such powers and duties within the scope of the office of county attorney as are prescribed by the county attorney, and within the limits of the sums made available by the board of county commissioners, each such deputy and assistant shall receive an annual salary in an amount prescribed by the county attorney.

K.S.A. 19-706b does not apply to your question because the county attorney is not hiring a deputy or assistant county attorney as an employee who receives an annual

¹ In your request for an opinion, you refer to someone acting as a special prosecutor. Because the county attorney prosecutes and defends in civil and criminal proceedings, we refer to an acting county attorney rather than a special prosecutor for purposes of this opinion. Our use of the term acting county attorney therefore includes, but is broader than, the term special prosecutor that is used in the statutes and case law.

² Subsection (b) provides that the county attorney is not required to appear in any civil action relating to the operation of the county hospital, but may appear at such action at the county attorney's discretion if requested by the board of county commissioners or the board of the county hospital.

salary. Thus, the fees of the acting county attorney are not paid from the salary of the county attorney.

We next look at the two statutes authorizing the appointment of an acting county attorney. One grants such authority to the board of county commissioners and the other to the court. Under both of those statutes, the appointed attorney becomes the county attorney for that particular case. As discussed below, the fund that is used to pay an acting county attorney is dependent upon which entity appoints such person.

Appointment by the board of county commissioners

K.S.A. 19-723 states:

That when, in the judgment of the board of county commissioners of any county in this state, it becomes necessary or expedient, the said board of county commissioners may employ an additional attorney at law to assist the county attorney of its county in any specific investigation, prosecution or any civil or criminal matter involving the duties of said county attorney, and the said board of county commissioners may pay such attorney so employed reasonable compensation for his services, the same to be charged to the general fund of said county.

Under K.S.A. 19-723, the board of county commissioners appoints the acting county attorney and is responsible for payment of the fees for the acting county attorney from the county's general fund.

Appointment by the court

K.S.A. 19-711 states:

In the absence, sickness or disability of both the county attorney and his deputy, any court before whom it is his duty to appear and in which there may be business for him, may appoint an attorney to act as county attorney, by order to be entered upon the minutes of the court.

The word "disability" includes cases involving an ethical disqualification of the county attorney.³ However, unlike K.S.A. 19-723, K.S.A. 19-711 is silent on the compensation of the acting county attorney. Thus, we look at other statutes to discern the answer.

K.S.A. 20-348 states:

Except for expenses required by law to be paid by the state, the board of county commissioners of each county have [*sic*] an obligation to

³ Attorney General Opinion No. 82-139.

adequately fund the operation of the district court in the county and shall be responsible for all expenses incurred for the operation of the district court in the county.

In Attorney General Opinion No. 2003-4, we concluded that pursuant to K.S.A. 20-348, the county is responsible for paying the fees of a special prosecutor appointed by the court under K.S.A. 19-711. In reaching this conclusion, we relied upon two cases.

In the first case, *Board of Osage County Comm'rs v. Burns*,⁴ the Kansas Supreme Court concluded that, because no statute required the state to do so, K.S.A. 20-348 required a county to pay the attorney fees for indigent defendants charged with misdemeanor crimes when imprisonment is a real possibility.⁵ In the second case, *In Re Care & Treatment of Raborn*,⁶ the Court affirmed the rationale of *Burns*. It applied K.S.A. 20-348 and concluded that, absent a statute requiring the state to do so, counties must pay the fees of attorneys appointed by the court to represent indigent individuals in cases arising under the Sexually Violent Predator Act.⁷

Our research revealed no intervening law to change the conclusion reached in Attorney General Opinion No. 2003-4. Thus, we believe in instances where no statute requires the state to pay the fees for an acting county attorney appointed by the court under K.S.A. 20-348, the county must compensate the acting county attorney.⁸ The procedure establishing the budget for the court is set forth in K.S.A. 2015 Supp. 20-349. To meet this obligation, the county has various options.

The county must have a system in place. It may contract for the services of attorneys; it may continue to budget funds for payment of counsel fees, in cooperation with the administrative judge, based upon the anticipated number of appointments and expected time required; or it may resolve the problem in other ways.⁹

To paraphrase the Court, "the responsibility for providing [a court-appointed acting county attorney] has been left by the legislature to the county, and the obligation is thus that of the county."¹⁰

Based upon the above analysis, we conclude that when the board of county commissioners appoints an acting county attorney pursuant to K.S.A. 19-723, the county compensates such attorney from its general funds. We further conclude that when the court appoints an acting county attorney pursuant to K.S.A. 19-711, the

⁴ 242 Kan. 544 (1988).

⁵ *Id.* at 549.

⁶ 259 Kan. 813 (1996).

⁷ *Id.* at 821.

⁸ Attorney General Opinion No. 2003-4.

⁹ *Burns*, 242 Kan. at 549.

¹⁰ *Id.*

county, with the cooperation of the chief judge, compensates such attorney from the funds for the operation of the district court if the county has not adopted a different system.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Janet L. Arndt

Janet L. Arndt
Assistant Attorney General

DS:AA:JLA:sb