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ATTORNEY GENERAL OPINION NO. 2019- 1

Keith E. Schroeder
Reno County District Attorney
206 West First Avenue, 5th Floor
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Re: Counties and County Officers—County Commissioners—Powers of Board of Commissioners; Control of Expenditures

District Officers and Employees—District Attorneys—Election of District Attorneys in Certain Judicial Districts; Term; Oath; Bond; Abolition of Office of County Attorney in Said Districts; Duties; Representation of County Hospital not Required; Assistants, Deputies, Stenographic, Investigative and Clerical Hire; Appointment; Compensation; District Attorney and Assistants Full-Time Positions, Law Practice Prohibited; Office Space; Special Counsel

Synopsis: A district attorney is an elected official who is not subordinate to the board of county commissioners (BOCC). As the county's chief prosecutor, the district attorney has several statutory and ethical obligations, including a duty to manage his or her workload so that each matter can be handled adequately. Although the BOCC has general authority over county expenditures, it has a statutory duty to provide reasonable sums necessary for the district attorney to meet his or her statutory duties of office. The Kansas Supreme Court has held that a BOCC must approve an elected official's expenditure if the expense is necessary for the official to fulfill his or her statutory duties. The Court also held that mandamus is the appropriate remedy if the BOCC fails to approve the necessary expenditure. Therefore, if the BOCC refuses to appropriate funds that the district attorney believes in good faith are necessary to fulfill his or her statutory obligations, the district attorney's remedy is to file a mandamus action against the BOCC. Cited herein: K.S.A. 2018 Supp. 19-101a; K.S.A. 19-212; 19-

229; 22a-101; K.S.A. 2018 Supp. 22a-102; K.S.A. 22a-104; 22a-106;
22a-109.

* * *

Dear Mr. Schroeder:

As District Attorney for Reno County, you ask whether the Reno County Board of County Commissioners must appropriate money for staff and office space when you believe such appropriations are necessary to fulfill your ethical and statutory duties as the county's chief prosecutor. You indicate in your letter that you believe the Reno County District Attorney's Office is significantly understaffed. According to your research, each prosecutor in your office is responsible for an average caseload of 1,272 cases, which significantly exceeds those of other prosecutors in this state. Given this heavy caseload, you explain that the attorneys in your office are unable to adequately prepare cases for trial. Your attorneys must often negotiate or offer plea agreements to defendants who you would otherwise take to trial if you were provided additional resources. In the end, you are concerned that you and the attorneys in your office are unable to meet the statutory and ethical obligations imposed on prosecutors.

The resolution of your question, in part, requires the interpretation of statutes. The rules of statutory construction are well known:

When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. A court determines legislative intent by first applying the meaning of the statute's text to the specific situation in controversy. When the language is unclear or ambiguous, the court employs canons of statutory construction, consults legislative history, or considers other background information to determine the statute's meaning.¹

First consider a district attorney's unique station in the county body politic. Like other officials, a district attorney is independently elected.² Unlike other officials, however, the Legislature has specifically directed that "in no event shall [a] district attorney be

¹ *Patterson v. Cowley County*, 307 Kan. 616, 622-23 (2018); see *State v. Spencer Gifts, LLC*, 304 Kan. 755, 755 (2016) ("Reliance on the plain and unambiguous language of a statute is the best and only safe rule for determining the intent of the creators of a written law.").

² K.S.A. 22a-101(a); K.S.A. 2018 Supp. 22a-102; see K.S.A. 19-120 (election of register of deeds); K.S.A. 19-801a (election of sheriff); K.S.A. 19-501 (election of treasurer); K.S.A. 19-301 (election of county clerk).

deemed an officer of any county.”³ Independently elected officials such as a district attorney are not subordinate to the board of county commissioners (BOCC).⁴ The BOCC and district attorney are instead coequal agents of the county government,⁵ and the BOCC is “the means by which the legislature finances the operation”⁶ of the district attorney’s office.

Various statutes define a district attorney’s powers and obligations.⁷

[I]t shall be the duty of the district attorney to appear in the several courts of the judicial district in which the district attorney is elected and to prosecute or defend, on behalf of the people therein, all matters arising under the laws of this state, and such civil matters as are instituted by the district attorney, in which the state or any county in such judicial district is a party or has an interest.⁸

To fulfill these obligations, district attorneys are authorized—within appropriated funds—to hire deputy district attorneys, assistant district attorneys, and staff.⁹

As attorneys, prosecutors must provide competent representation, which “requires the legal knowledge, skill, thoroughness and *preparation reasonably necessary for the representation*.”¹⁰ Kansas Rule of Professional Conduct 1.3 mandates that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”¹¹ Diligence is achievable only when “[a] lawyer’s workload [is] controlled so that each matter can be handled adequately.”¹²

³ K.S.A. 22a-101(a); see *Oltremari by McDaniel v. Kansas Social & Rehabilitative Service*, 871 F. Supp. 1331, 1347-48 (D. Kan. 1994) (district attorneys are entitled to Eleventh Amendment immunity because they are an “arm of the state”); Attorney General Opinion No. 1987-13 (for the purposes of the Kansas Tort Claims Act, district attorneys and their agents are employees of the state); *contra Stuart v. Douglas County*, 21 Kan. App. 2d 784, 788 (1995) (for the purposes of workers compensation, district attorneys are county employees); Attorney General Opinion No. 1980-26 (for the purposes of KPERS, district attorneys are county employees).

⁴ See Attorney General Opinion No. 2017-7 (BOCC could not enforce its anti-nepotism policy with respect to personnel under the direct supervision of another elected county official when that official refuses to do so); Attorney General Opinion No. 1994-159 (“[T]he county attorney may set office hours open to the public in his or her discretion, and the board of county commissioners may not collect forfeiture for non-compliance with K.S.A. 19-2601 for failure to keep the office open.”).

⁵ See Attorney General Opinion No. 2016-16 (BOCC did not have the legal authority to subject a county clerk, county treasurer, county sheriff, or county register of deeds to personnel policies and procedures requiring random drug testing).

⁶ *Board of County Commissioners of Lincoln County v. Nielander*, 275 Kan. 257, 261 (2003).

⁷ K.S.A. 22a-101 (district attorney is an executive officer of the judicial district in which the district attorney is elected); K.S.A. 22a-104; K.S.A. 22a-106(b) (“Each district attorney and his assistant district attorneys shall devote full time to official duties and shall not engage in the civil practice of law.”).

⁸ K.S.A. 22a-104.

⁹ K.S.A. 22a-106(a).

¹⁰ K.R.P.C. 1.1 (2018 S. Ct. R. 289) (emphasis added).

¹¹ (2018 S. Ct. R. 292).

¹² K.R.P.C. 1.3, Comment [1] (2018 S. Ct. R. 292).

Elsewhere in the Kansas Code of Professional Conduct, prosecutors are cautioned that they are “minister[s] of justice.”¹³ Consequently, they are charged with the “specific obligations to see that defendants are accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”¹⁴ As our Supreme Court recently explained, the power of a prosecutor to “charge and prosecute its citizens for criminal violations of the law is a fearsome one, and it is vested exclusively in a prosecutor who is given vast discretion to make both charging decisions and the myriad of practical and strategic decisions that occur in the course of a prosecution.”¹⁵

A BOCC, on the other hand, derives its authority from the Kansas home rule statute.¹⁶ Subject to several enumerated exceptions not relevant here, it “may transact all county business and perform all powers of local legislation and administration it deems appropriate[. . .].”¹⁷ More specifically, a BOCC has the power “[t]o examine and settle all accounts of the receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county” as well as the responsibility to “have the care of the county property, and the management of the business and concerns of the county [. . .].”¹⁸ Another statute provides that the BOCC “shall have exclusive control of all expenditures [. . .].”¹⁹ Our Supreme Court has construed these statutes to mean that “county commissioners have general authority over their county purse.”²⁰

Despite their general authority over the purse, a more specific statute provides that “county commissioners *shall determine and allow such reasonable sums from funds of the county* for the compensation of assistants, deputies and other stenographic, investigative and clerical hire and for other expenses of such [district attorney’s] office *as may be necessary to carry out the function of such office.*”²¹ A BOCC must also “provide suitable office space” for certain district attorneys and their staff.²²

¹³ K.R.P.C. 3.8, Comment [1] (2018 S. Ct. R. 353).

¹⁴ *Id.*

¹⁵ *State v. Sherman*, 305 Kan. 88, 92 (2016).

¹⁶ See K.S.A. 2018 Supp. 19-101a(a).

¹⁷ K.S.A. 2018 Supp. 19-101a(a).

¹⁸ K.S.A. 19-212.

¹⁹ K.S.A. 19-229.

²⁰ *Nielander*, 275 Kan. at 267; see *Crow v. Board of County Commissioners of Shawnee County*, 243 Kan. 287, 290 (1988) (BOCC has “clear authority . . . to determine how its general fund shall be used in meeting county expenses”); *Hackler v. Board of County Commissioners of Johnson County*, 189 Kan. 697, 698 (1962) (“A reading of [K.S.A. 19-212] leaves little outside of the commissioners’ power as to financial affairs.”).

²¹ K.S.A. 22a-106(a) (emphases added).

²² K.S.A. 22a-106(c). Subsection (c) mandates that only the BOCC in judicial districts 3, 10, 18, and 29 must provide suitable office space for district attorneys and their staff, but K.S.A. 22a-109, which established the 27th judicial district in Reno County, incorporated the 27th judicial district into K.S.A. 22a-104 and K.S.A. 22a-106.

A tension thus exists between a BOCC's general power over the budget and its statutory directive to grant "reasonable sums" to the district attorney. Our Supreme Court addressed a similar statutory tension in *Board of County Commissioners of Lincoln County v. Nielander*.²³ There the BOCC adopted a purchase policy requiring advance approval for the purchase of any equipment or supplies in excess of \$250. The sheriff challenged the policy, claiming it inhibited the execution of his statutory obligations. In response, the BOCC argued the purchase policy fell within its exclusive authority over county expenditures.²⁴

Addressing that impasse, the Court held:

[T]hat where a board of county commissioners has approved a budget including necessary expenses, the sheriff cannot be required to obtain advance approval for purchases within the limits of the approved budget regardless of the amount. If an expenditure falls outside of the budget, *i.e.*, over budget, then the sheriff must request advance approval of the board regardless of the amount. *The board must approve the expenditure if it is necessary for a sheriff to carry out his or her statutory duties. If a board fails to approve a necessary expenditure, then the sheriff's remedy is to mandamus the board.*

. . . .

After examining the statutes in question, this court finds that where the expenditure in question is optional or discretionary, a board of county commissioners' authority over county expenditures will generally control. . . . *A board of county commissioners may not require an elected official to obtain prior approval by the board for expenditures that are necessary for the elected official to carry out statutory duties, however.*²⁵

Although *Nielander* resolved a conflict between a BOCC and sheriff, we believe the Kansas Supreme Court would find its holding equally applicable here.²⁶ In fact, the Court may find its reasoning *more* compelling here because the BOCC has a specific statutory duty to set aside reasonable funds so that the district attorney can fulfill the duties of his or her office.²⁷ The statutory canon that a specific provision

²³ 275 Kan. 257 (2003).

²⁴ *Id.* at 267-68. The BOCC conceded, however, that it could not deny elected officials the means to perform their statutory duties.

²⁵ *Id.* at 269 (emphases added).

²⁶ See *Allen v. Kline*, 507 F. Supp. 2d 1150, 1163 (D. Kan. 2007) ("Although *Nielander* involved a different statute, it suggests that to the extent K.S.A. § 22a-106 grants district attorneys power to dismiss employees, the Kansas Supreme Court would find that the county cannot supersede that power.").

²⁷ K.S.A. 22a-106(a).

controls over a conflicting general provision favors K.S.A. 22a-106.²⁸ We also think it safe to presume that the Legislature was aware of a district attorney's ethical duties when drafting and enacting K.S.A. 22a-106, which—in turn—suggests the statute was intended to ensure district attorneys receive adequate funding to avoid ethical dilemmas.²⁹ It is our opinion that while the BOCC retains general authority over the county budget, it may not deprive the district attorney of the funds needed to fulfill his or her statutory duties of office. And if the BOCC refuses to appropriate funds that the district attorney believes in good faith are necessary to fulfill his or her statutory and ethical obligations, the district attorney's remedy is to file a mandamus action against the BOCC.³⁰

In reaching this conclusion, we recognize “mandamus cannot be invoked to compel a public official to perform a discretionary duty.”³¹ But because *Nielander* strongly suggests that if the funds a district attorney requests are indeed necessary to meet his or her statutory duties, the BOCC's duty to provide adequate funds is not discretionary, making mandamus the appropriate remedy.³²

You also ask whether prosecutors are exempt from the ethical requirements of Supreme Court Rule 226. To that end, you cite several cases from other jurisdictions discussing the ethical obligation of attorneys to manage their caseloads. Though we note some of these ethical duties while construing various statutes, we abstain from opining on whether the BOCC must appropriate additional funds for attorneys in your office to meet your ethical obligations under the Kansas Rules of Professional Conduct. You may wish to request an opinion from the Kansas Bar Association's Ethics Advisory Committee.³³

²⁸ See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, 183-88 (“Under this canon, the specific provision is treated as an exception to the general rule.”).

²⁹ See Attorney General Opinion No. 1992-158 (suggesting that the Legislature rejected a proposed amendment to K.S.A. 19-701 that would have allowed a BOCC to impose its personnel policies on employees of the county attorney because attorneys are ethically responsible for the conduct of their subordinates); see also *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 912 (2008) (“The legislature lacks constitutional authority to intrude into the attorney general's duties as an officer of the court. The legislature cannot override an attorney's ethical duties to the court or direct the attorney general to file an action if the attorney general has a good faith belief that the action seeks an unconstitutional remedy.”).

³⁰ See *Nielander*, 275 Kan. at 269; *State, ex rel., Smith v. State Highway Commission*, 132 Kan. 327, 334-35 (1931) (“The use of mandamus to secure a speedy adjudication of questions of law for the guidance of state officers and official boards in the discharge of their duties is common in this state.”).

³¹ *Ambrosier v. Brownback*, 304 Kan. 907, 911 (2016).

³² Cf. *Gannon v. State*, 303 Kan. 682, Syl. ¶ 9 (2016) (“Through Article 6 of their constitution, the people of Kansas expressly assigned duties to the legislature that both empower and obligate it to make suitable provision for finance of the educational interests of the state. Under this article, the legislature must perform its duties in compliance with the requirements the people have established.”).

³³ See Davis, *Requesting an Ethics Opinion*, 69 K.B.A.J. 26 (2000).

In sum, district attorneys are politically elected officers who derive their power from the Legislature, not the BOCC. As such, they have distinct statutory and ethical duties. Although the BOCC has the general power over the county's budget, K.S.A. 22a-106(a) dictates that it must provide reasonable funds so that the district attorney can fulfill the duties of office. Pursuant to *Nielander*, the BOCC must approve the expenditure if a district attorney is unable to carry out his or her statutory duties without it. If the district attorney believes in good faith that the expenditure is necessary to fulfill the duties of his or her office and the BOCC refuses to appropriate the funds, the district attorney's remedy is to file a mandamus action against the BOCC.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Kurtis Wiard

Kurtis Wiard
Assistant Attorney General

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