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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

May 6, 1974

Opinion No. 74-139

Thomas C. Lysaught
Wyandotte County Counselor
511 Huron Building
Kansas City, Kansas 66101

Dear Mr. Lysaught:

You inquire whether the Board of County Commissioners of Wyandotte County may authorize and allow additional compensation to the District Attorney of the Twenty-Ninth Judicial District for appearances outside the county on county business and, in particular, for appearances before the Kansas Supreme Court.

The general rule has long been that a county attorney is not required by law to go beyond the limits of his county to do business for his county, but if he does, he may be allowed reasonable compensation therefor. In Comm'rs of Leavenworth County v. Brewer, 9 Kan. 307 (1872, Justice Valentine, speaking for the Court, held thus:

"And the rule with regard to compensation unquestionably is, that whenever the law requires the county attorney to perform any particular service or duty he cannot receive or recover any compensation for the performance of such service or duty in addition to his salary and the specific fees allowed by statute His salary is intended to be sufficient compensation for the performance of all his services and duties required by law, except where the statute otherwise specifically provides But where the county attorney performs services for the county which are not required of him by law he may be paid therefor by the county the value thereof as though he were not the county attorney; and the county board

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may contract with him for the performance of such services as are not required of him by law, in the same manner and to the same extent as they could contract with any other person for the performance of such services. There is no law that requires a county attorney to attend any court, or do any business, civil or criminal, that requires his personal attendance outside of his own county; and therefore if he should perform any such services for his county he may be allowed such compensation therefor as his services are reasonably worth." [Emphasis by the Court.] 9 Kan. at 317, 318.

The duties of the district attorney as defined by K.S.A. 22a-104 are virtually identical to those of the county attorney as set forth in K.S.A. 19-702, upon which the cited case was decided. K.S.A. 22a-104 states thus in pertinent part:

"It shall be the duty of the district attorney to appear in the several courts of the judicial district in which he 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 therein. Any power or duty now conferred or imposed by law upon all county attorneys within their respective counties shall be exercised or performed by district attorneys within their respective districts" [Emphasis supplied.]

The question whether additional compensation may be paid to the district attorney for out-of-county appearances stems from 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, except as required in performing his official duties while serving as district attorney or assistant district attorney"

This provision poses an apparent dilemma. As defined by K.S.A. 22a-104, and in light of Comm'rs v. Brewer, supra, the official duties of the district attorney do not include, in the ordinary course, out-of-county appearances, including those before the Kansas Supreme Court. Yet, he is required to devote full time to his official duties. As a result, it may doubtless be

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argued, the district attorney is ineligible to continue to prosecute and defend those cases in which the county or the state is interested, and which require his appearances in courts beyond the territorial jurisdiction of the judicial district.

We think this conclusion is manifestly unsound. In defining the duties of the district attorney, the Legislature adopted virtually in toto, with slight modernization, the same language which since 1868 has defined the duties of county attorneys of this state. The Legislature manifestly intended no change therein, except as expressly provided by the 1972 act. Heretofore, in most, if not all, of the counties of the state, the salary of the county attorney is such that he must, and is expected to, engage in the private practice of law. The 1972 Legislature intended to change this practice in judicial districts where the office of district attorney was established. Hence, there was enacted the twofold direction that he shall "devote full time to official duties" and that he "shall not engage in the civil practice of law" The two requirements are stated conjunctively, and must be read as complementary to each other.

Historically, the greatest number of appearances of the county attorney in courts beyond the territorial jurisdiction of the county has been before the Kansas Supreme Court, representing the state in appeals by persons convicted of criminal offenses in the district court of the county. It would be both cumbersome for the administration of criminal justice, and costly to the county of the judicial district, to require the county to employ new counsel to represent the state on appeal, and to forbid the district attorney to continue to defend appeals from criminal convictions obtained in prosecutions by his own office.

Nothing in the 1972 act creating the office of district attorney suggests a legislative intention to change this long-established practice. In our view, the direction that the district attorney "devote full time to his official duties" must be construed merely to complement the injunction that the district attorney "shall not engage in the civil practice of law," and does not prohibit the district attorney from contracting with the county to provide representation and counsel in courts outside the territorial jurisdiction of the judicial district, in which the county or the state is interested.

Yours very truly,


VERN MILLER
Attorney General

VM:JRM:jsm