



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

January 29, 1975

Opinion No. 75-34

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

Dear Mr. Lysaught:

You inquire concerning your responsibility as county counselor to defend elected county officials in lawsuits brought against them based upon claims of alleged negligence in the performance of the duties of their offices. In particular, you advise that in recent months, several suits have been filed against the sheriff and the marshal of Magistrate Court. Both officials are covered by statutory bonds, and in some instances, the bonding companies have agreed to provide defense counsel. In most cases, however, they have refused to do so.

You inquire whether it is the responsibility of the county counselor to defend the sheriff, marshal or other officials in such matters, or whether these officials are required to engage counsel of their own choice and at their own expense. K.S.A. 19-247 defines the duties of the county counselor in pertinent part as follows:

"The county counselor shall, when requested by the board of county commissioners, or when it may be necessary, attend the meetings of such board . . . ; commence, prosecute or defend, as the case may require, all civil suits or actions in which the county is interested . . . and shall perform all the duties in civil matters that have heretofore been required by law of the county attorney of such counties."

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I enclose a copy of an opinion dated September 7, 1967, issued by Attorney General Robert C. Londerholm, to James R. Martin, Osborne County Attorney, considering the question whether the board of county commissioners may pay the expenses of defending the sheriff in a civil suit in federal court for damages for false imprisonment. General Londerholm concluded that the county might very justifiably be interested in providing defense services to the sheriff in a lawsuit based on alleged conduct of the sheriff in carrying out the duties of his office.

In recent years, public officials have increasingly found themselves to be defendants in litigation based upon their actions performed under color of the authority of their office. These persons are often not financially able to support the costs of defense which must necessarily be incurred in such cases. It is certainly in the interest of the conduct of government that officials not be intimidated or deterred in the performance of the duties of their office by threats of litigation. Recognizing the rising incidence of such litigation, the 1972 Legislature provided for the defense of public officers. K.S.A. 1974 Supp. 75-4356 provides thus:

"In event any elected or appointed state, county, city or school district officer or appointed deputy or assistant shall be sued for damages for any alleged nonfeasance, misfeasance or malfeasance of the duties of his office, the state, county, city or school district may provide necessary legal counsel and pay other necessary expenses for the defense of the action. The legal counsel may be the attorney general, county attorney, city attorney, attorney for the school district or other counsel."

Under K.S.A. 1974 Supp. 75-4358, all payments authorized under this provision may be from the general operating fund. Defense shall not be furnished under the authority of this enactment when an officer is charged with any criminal violation, or in any ouster or other action to remove the officer from performance of his official duties. This enactment does not require the county to provide representation, but authorizes it to do so.

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Whether the county is "interested" in any particular lawsuit against a county officer depends, necessarily, upon the facts and circumstances of the particular case. It has long been the policy of this office to extend the services of this office in defending lawsuits brought against them arising from actions performed in the course of their authorized duties. Whether the county is "interested" in the defense of particular cases against individual county officers rests with the board of county commissioners, necessarily.

You also inquire whether, if a judgment is entered against a county officer, as, for example, the sheriff or the marshal of the Magistrate Court, it is the responsibility of the county to pay the judgment or any portion thereof. If a judgment is obtained against such an officer, the liability is his alone, and does not become that of the county merely because of the position of the defendant as a county officer. If the county as a quasi-municipal corporation is not a party to the case, the county is not liable for any judgment entered against any such county officer individually. Because the judgment creates only a personal liability on the part of the officer, it would be an improper use of public funds, in our judgment, to volunteer, as it were, funds of the public treasury to satisfy the judgment of an individual citizen, officeholder or otherwise.

If further questions should arise concerning this matter, please do not hesitate to call upon us.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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Enclosure



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

September 7, 1967

Mr. James R. Martin
County Attorney
Osborne County Courthouse
Osborne, Kansas

Dear Mr. Martin:

You have asked for our opinion whether the board of county commissioners may pay the expense of defending the county sheriff in a civil suit in federal court for damages for false imprisonment.

In Heinz v. Shawnee County Commissioners, 136 Kan. 104 (1932), the Kansas Supreme Court recognized the authority of the county commissioners to employ counsel to perform services which the county attorney is not required to perform. The Court noted that the county may do what a private person might do to protect his interests, and to this end may employ an attorney. It further noted that the county might be involved or interested in litigation in courts other than the courts of the county. Therefore, if the county is involved or interested in the suit against the county sheriff, and if it is in the county's interest to defend the sheriff, the county commissioners may properly employ an attorney or share the costs of defense with the sheriff. In the Heinz case, the Kansas Supreme Court stated:

"The actual burden of law enforcement in a county, from apprehension of the suspect to execution of judgment, rests chiefly on the county."

A large portion of the duties inherent in law enforcement are performed by the county sheriff. If, during the course of performing these duties, the sheriff becomes a defendant

in a civil lawsuit arising from his conduct, and if such conduct is not in excess of the duties and methods which a conscientious exercise of his functions necessitates, we believe that the county has an interest in seeing that the sheriff continues to carry out his duties in this manner. Of course there may be situations where, in the judgment of the county commissioners, the sheriff's methods or motives appear to be improper and not in the county's interest. However, this is a decision that the county commissioners must make on a review of the facts and an evaluation of the merit of the lawsuit.

If the commissioners decide that the sheriff should be assisted, they may employ either the county attorney or some other attorney to provide the legal services.

In Edwards County Commissioners v. Simmons, 159 Kan. 41 (1944), the Kansas Supreme Court determined that where an appearance in court and preparation for such is on behalf of the county but is not within the scope of the county attorney's duties, the county commissioners might properly pay the county attorney a fee in addition to his statutory salary for the services performed.

In the last analysis, the question of whether to provide counsel and the amount of compensation are matters within the discretion of the county commissioners. See Eckler v. Board of County Commissioners, 139 Kan. 697 (1952).

Very truly yours,

ROBERT C. LONDERHOLM
Attorney General

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