



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

February 6, 1975

Opinion No. 75- 43

Mr. Lowell F. Hahn
Phillips County Attorney
Phillips County Courthouse
Phillipsburg, Kansas 67661

Dear Mr. Hahn:

You advise that questions have arisen concerning the responsibility for processing both civil and criminal appeals from the District Court of Phillips County, Kansas, to the Kansas Supreme Court, and for representing the county in taxpayer appeals to the Kansas Board of Tax Appeals, as well as representing the county before other state boards and agencies.

First, you inquire as to the obligation of the county attorney in the foregoing circumstances. I enclose herewith a copy of Opinion No. 61-27, issued February 13, 1961, by Attorney General William M. Ferguson, who refers to K.S.A. 19-702, which provides thus:

"It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute or defend on behalf of the people all suits, applications or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a part or interested."

In Commissioners of Leavenworth County v. Brewer, 9 Kan. 307 (1872), an action brought by a former county attorney for compensation for services rendered by him at the request of the board of county

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commissioners in representing the county in a federal court, the court held, in its syllabus thus:

"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 a reasonable compensation for the services, in addition to his salary."

In its opinion, the court states thus:

". . . [T]he rule with regard to compensation unquestionably is, that whenever the law requires the county attorney to perform any service or duty, he can not 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. . . . 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 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 supplied.]

In a number of decisions since that time, the Court has adhered to this precedent. Thus, the county attorney has no duty to go

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beyond the boundaries of the county to represent the county in either a criminal or civil appeal to the Kansas Supreme Court. If he does do so, however, he is entitled to compensation therefor. If the board of county commissioners choose not to contract with the county attorney for his services, they are empowered by K.S.A. 28-319 to employ special counsel in civil cases thus:

"That in any civil litigation wherein the county may be either plaintiff or defendant, if the county attorney or his deputies are interested directly or indirectly, or if the board of county commissioners believes that the time at the disposal of the county attorney's office is insufficient to give proper attention to such litigation or if for any other reason the board of county commissioners deems it necessary for the protection of the public interests, it may employ special counsel for such case or cases and pay reasonable compensation therefor, not exceeding the sum of three thousand dollars in any one year."

Concerning the duty of the county attorney to represent the state in a criminal appeal, in Heinz v. Shawnee County Commissioners, 136 Kan. 104, 12 P.2d 816 (1932), the court stated thus:

"Management and control of the state's side of a criminal appeal is vested by the statute in the attorney-general. Employment of the county attorney to represent the county is not designed to displace the attorney-general or to invade the province of his official duty. The purpose of the employment is to aid the attorney-general for the better protection of the county's own peculiar interest, and that the attorney-general may stand in need of such aid,

particularly in cases of great importance presenting voluminous records, is not debatable.

* * *

The benefit to be derived from the advice and assistance of counsel who conducted the prosecution, in the preparation of briefs and in presentation of the appeal, cannot be gainsaid.

"It may be observed here that it is a common practice for the county attorney freely to assist the attorney-general. The county attorney is not, however, bound to do so. He could not be ousted from office for failure to perform an official duty if he refused. The statute provides that the attorney-general shall consult with and advise county attorneys, when requested, in all matters pertaining to their official duties . . . ; but there is no reciprocal statute, and assistance given the attorney-general by the county attorney is given as a matter of professional courtesy and from desire to serve." 136 Kan. at 107-108.

Thus, in the event the county attorney is unable to represent the interest of the state in a criminal appeal, it is the duty of the attorney general to assume the burden of that representation. The Court in 1932 clearly contemplated that the common practice of county attorneys to assist in criminal appeals would continue:

"This cooperation will doubtless be manifested in the future as it has been in the past; but the attorney-general should not press the matter too far, and boards of county commissioners should not press the matter too far."

Certainly, the volume of criminal appeals has increased manyfold since 1932. Uniformly, county attorneys have handled the prosecution of criminal appeals to the Kansas Supreme Court on

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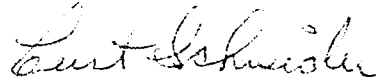
behalf of the state. Technically, however, on the basis of existing decisions of the Kansas Supreme Court, we conclude, first, that the county attorney has no official duty to undertake the representation of the state's interest in such appeals, and that if he does not do so, that the board of county commissioners has no duty to provide such representation, for this office must then assume that representation. With only the rarest exceptions in recent years, this office has enjoyed the cooperation of county attorneys and boards of county commissioners in assuring that the interest of the state is adequately represented in criminal appeals. If this cooperation were to cease from even one county, the burden falling on this office would require us to draw the matter to the attention of the Legislature, for either budgetary resources to support the added duties, or for clarification and specification of the duties of counties in such matters.

As to civil litigation in which the county is interested or a party in the Kansas Supreme Court, involving county affairs and business, it is the duty of the board of county commissioners to assure that the interests of the county are adequately represented. The county board has the care of county property, and the management of all the business and concerns of the county. If the county is a party to a civil appeal before the Kansas Supreme Court in which the state, as distinguished from the county, has no particularized interest other than that accruing to the county, it is the duty of the county commissioners to provide for such representation and legal services as are necessary to assure adequate representation of the interests of the county. Similarly, in taxpayer appeals before the State Board of Tax Appeals, in which county levies are challenged or in which other questions are raised affecting the financial and fiscal resources of the county, it is, once again, the responsibility of the board of county commissioners to provide such legal representation as may be necessary to protect the interests of the county. Because such litigation occurs outside the territorial boundaries of the county, the county attorney has no responsibility to represent the county therein. If the board of county commissioners does not assure representation of the county in such proceedings, either by contract with the

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county attorney or with another attorney, the commissioners may be liable to charges of neglect of county affairs.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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