



STATE OF KANSAS

*Office of the Attorney General*

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

CURT T. SCHNEIDER  
*Attorney General*

June 27, 1975

Opinion No. 75-263

Mr. Larry R. Mears  
Atchison County Attorney  
Atchison County Courthouse  
Atchison, Kansas 66002

Dear Mr. Mears:

You advise that recently suit was filed in the Atchison County District Court against defendants styled as the "Board of County Commissioners of Atchison County, Kansas, whose members are Richard Scholz, Commissioner, A. J. Pickman, Commissioner, and Robert Lykins, Commissioner," seeking a temporary and permanent injunction against performance under a contract for the reappraisal of land in Atchison County. You represented the defendants in that case, and inquire whether representation of the defendants in this action is a part of the duties of your office.

This question is raised in light of an opinion dated September 25, 1969, issued by Attorney General Kent Frizzell, concluding that it is within the authority of the board of county commissioners to contract with the county attorney or other counsel to represent county officers and employees in private civil actions filed against such officers and employees as a result of actions or omissions arising out of the performance of official duties of the officer or employee. I enclose a copy of that opinion, as well as two earlier opinions referred to therein. Each of these opinions dealt with the furnishing of representation to a county officer who was a defendant in a private civil suit asserting personal liability against the officer. In each instance, the Attorney General concluded that the county may be sufficiently interested in the suit to authorize the employment of counsel, whether the county attorney or other counsel, when the representation was not an official duty of the office of the county attorney.

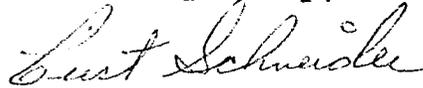
Mr. Larry R. Mears  
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K.S.A. 19-702 states thus:

"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 party or interested."

In the case which prompts your inquiry, the county governing body was itself a defendant, sought to be enjoined from the discharge of certain governmental duties, i.e., the reappraisal of property for purposes of assessment and taxation. Under K.S.A. 19-702, this suit appears to be one the defense of which falls clearly within the ambit of the statutorily defined duties of the office of county attorney.

Yours very truly,



CURT T. SCHNEIDER  
Attorney General

CTS:JRM:kj



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September 25, 1969

Mr. Donald H. Humphreys  
Barton County Attorney  
Barton County Courthouse  
Great Bend, Kansas 67530

Mr. Tom E. Cooper  
Barton County Commissioner  
Barton County Courthouse  
Great Bend, Kansas 67530

Gentlemen:

Each of you has asked whether county commissioners have authority under Kansas law to enter into contracts with private attorneys to represent county employees in private civil actions filed against the county employees as a result of situations arising out of the county employee's official duties. In the case about which you ask the county attorney was retained under a contract by the county commissioners in his capacity as a private attorney to represent the Sheriff of Barton County in an action brought against the sheriff as a result of charges filed against the plaintiff by legal authorities of the county.

The opinion of the county attorney in this case, who is, of course, Mr. Humphreys, is that the commission may make such contracts with attorneys to represent county officials, since the county attorney is himself not bound to undertake such representation. However, Mr. Humphreys seeks the advice of this office on whether his opinion is correct in this case, since he is the attorney who would be benefited by the application of this opinion. Mr. Cooper likewise seeks to insure that the county is incurring a proper obligation, and has asked the advice of someone other than one personally connected with the matter.

This office is in full agreement with the opinions expressed in Mr. Humphreys' letter to us, a view which has long been held by this office. We enclose copies of opinions written in March of 1953 and September, 1957. The former states that it would not be improper for the county attorney to represent a county officer sued in a matter such as the one in this instance, although he has no statutory duty to represent that officer. The latter opinion is, we think, directly in point.

We therefore conclude that it is perfectly proper for the county commissioners of a county in Kansas to contract with their county attorney to provide legal services which the county attorney is not otherwise obligated to perform as a part of his function as county attorney, so long as no conflict of interest is involved between the outside work and his duties as county attorney.

We hope this sufficiently answers your question.

Very truly yours,

KENT FRIZZELL  
Attorney General

RFH:rh

Enc.

cc: Letter to Robert Dole, dated March 10, 1953  
Letter to James Martin, Osborne, dated Sept. 7, 1967

September 7, 1967

Mr. James H. 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 Heine 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 Heine 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 Fackler v. Board of County Commissioners, 139 Kan. 697 (1952).

Very truly yours,

ROBERT C. LONDERHOLM  
Attorney General

JRF/k1

March 10, 1953

Mr. Robert Dole ✓  
County Attorney  
Russell, Kansas

Dear Robert:

This will acknowledge your letter of March 6, 1953, addressed to Paul Wilson of this office.

We note you indicate that the Sheriff of Russell County is named as a defendant in a suit for false arrest, now pending in the District Court of Johnson County, Kansas. You inquire as to your responsibility for representing this officer as part of your official duty as County Attorney.

It is the opinion of this office that you are not legally responsible for the performance of this service by virtue of being County Attorney of Russell County. I am sure that you are familiar with the provisions of the statutes pertaining to the office which you hold.

G. S. 19-702 provides:

"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 party or interested."

19-702, 704 ✓

Section 19-704 provides:

"The county attorney shall without fee or reward give opinions and advice to the board of county commissioners and other civil officers of their respective counties, when requested by such board or officers, upon all matters in which the county is interested, or relating to the duties of such board or officers, in which the state or county may have an interest."

A review of other pertinent statutes does not disclose any responsibility on the part of the county attorney to represent an officer when sued in his official capacity in another county. At the same time we should comment that in other instances county attorneys have appeared as counsel in cases of this nature. As a matter of policy, we do not believe such appearances to be improper, although there is no statutory authorization therefor.

It also occurs to us that the Sheriff's bondsmen should be interested in this suit. If the bonding company has not already been notified, I would suggest that such notice be given them forthwith.

It is our further view that the action is not one wherein a judgment would be payable from county funds. Notwithstanding the fact that the petition appears to charge the Sheriff with commission of a wrong in his official capacity, we do not feel that the action is one to which the county can be a party and for which the county would have liability.

I hope these comments may be of assistance to you.

Very truly yours,

HAROLD P. FATZER  
Attorney General

PEW:nh