



STATE OF KANSAS

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August 19, 1982

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ATTORNEY GENERAL OPINION NO. 82-183

The Honorable Ed C. Rolfs
State Representative, Sixty-Fifth District
424 North Madison
Junction City, Kansas 66441

Re: Automobiles and Other Vehicles -- Serious Traffic
Offenses -- Driving While Under Influence of
Alcohol; Performance of Public or Community Service
Work by Convicted Violators

Synopsis: As amended by L. 1982, ch. 144, §5, K.S.A. 1981
Supp. 8-1567 provides that a person convicted of
a violation of the offense of operating a motor
vehicle while under the influence of alcohol may
be required to perform public or community service
work as an alternative to incarceration or payment
of a fine. In assigning the work to be performed,
a judge or court services division would be exer-
cising judicial and discretionary functions, re-
spectively, and would be exempt from liability
under the Tort Claims Act, K.S.A. 1981 Supp.
75-6101 et seq. However, as noted by Attorney
General Opinion Nos. 81-98 and 82-157, the recipi-
ent organization (including local governments and
non-profit corporations) may be liable for injuries
and damages inflicted or suffered by persons act-
ing within the scope of their designated community
service duties. Cited herein: K.S.A. 1981 Supp.
8-1567 (as amended by L. 1982, ch. 144, §5), K.S.A.
21-4610, K.S.A. 1981 Supp. 75-6102, 75-6104.

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Dear Representative Rolfs:

As State Representative for the 65th District, which includes
Junction City and Geary County, you request our opinion on

several questions regarding recent amendments to K.S.A. 1981 Supp. 8-1567 and related statutes concerning the offense of operating a vehicle while under the influence of alcohol. Specifically, you inquire as to the effect of provisions which allow a person who has been accused or convicted of a violation to perform community service work in lieu of serving time in jail or paying a fine. Your questions concern the discretion of a judge in assigning a person to perform such tasks, and the potential liability of a city should a participant in the program be injured, cause injury to another or damage private property.

As amended, subsection (c) of K.S.A. 1981 Supp. 8-1567 provides:

"Upon a first conviction of a violation of this section, a person shall be sentenced to not less than 48 hours' imprisonment or 100 hours of public service nor more than 6 months' imprisonment and fined not less than \$200 nor more than \$500, or by both such fine and imprisonment."

The provision for the performance of public service is a new feature of the subsection, which previously allowed the imposition of jail time, a fine or both. While a court's discretion has been removed as to whether to impose a fine or a sentence (see Attorney General Opinion No. 82-175), the subsection's language does provide an alternative to incarceration in the form of "public service."

Subsection (g) of the statute as amended provides a further alternative which concerns payment of any fine, to-wit:

"In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to \$5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date."

While the phrase used herein is "community service," we would assume (in the absence of any legislative intent to the contrary) that such activity is synonymous with the "public service" mentioned at subsection (c).

Specific details concerning the performance of such service are not set forth by the amended statute, i.e. what entities are eligible for inclusion in a program made up of violators performing community service work, how such persons are assigned and what degree of liability, if any, exists on the part of the courts or the recipient organizations. However, other statutes give guidance as to the tasks the participants could be assigned and the potential liability which could be incurred. For example, the Kansas Criminal Code section on conditions of probation and suspended sentence, K.S.A. 21-4610, provides that a court, as one of the conditions it prescribes, may require a violator to:

"Perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community." K.S.A. 21-4610(k).

While a sentence to perform community service work under K.S.A. 1981 Supp. 8-1567 is not precisely the same as a condition of probation or a suspended sentence, it is closely akin, and in our opinion the same type of discretion is vested in the court as in the above-quoted statute. See also 14 W.L.J. 57, 65 (1975).

As to the questions which arise concerning the liability which various entities associated with this assignment process could incur, we note that similar questions were addressed by two prior opinions of this office, Nos. 81-98 and 82-157. The former addressed the liability of a court in setting, and a probation officer in administering, conditions of probation and suspended sentences. As to a court, the opinion looked to K.S.A. 1981 Supp. 75-6104(b) and concluded:

"[I]t is our opinion that when the district court exercises its discretion by assigning a probationer to [a] program as a condition of probation, it is clearly performing a judicial function and is, therefore, immune from tort liability in the event the probationer is injured or commits a tort while performing work under the program." (p. 4)

Concerning a probation officer who would oversee the performance of the probation or suspended sentence conditions, the opinion stated:

"[I]t is our opinion the probation officer, in assigning a probationer to a particular recipient organization is performing a discretionary function or duty which necessarily flows from the district court's exercise of its judicial function in setting terms and conditions of probation. This being the case, K.S.A. 1980 Supp. 75-6104(d) exempts such probation officer from liability resulting from the exercise of such discretionary function or duty." (p. 5)

We believe the same results would be true for a court services employee who would seek to place and then monitor those performing community service work under K.S.A. 1981 Supp. 3-1567, as amended.

A different result was reached in the case of the ultimate recipient of the person's efforts. In Attorney General Opinion No. 81-98, the master-servant doctrine was applied in finding that a non-profit corporation or private organization which oversaw the work of the participant could, under the correct circumstances, be liable for the latter's actions. This would of course depend on a determination of negligence on the part of the worker, which finding could then be applied to the organization only if the actions were within the scope of the worker's assigned duties. Here, as there, it is the recipient organization which directly controls the physical activities of the worker, as well as issuing the necessary equipment and determining if the work has been properly done. Accordingly, our conclusion reached therein may be applied here.

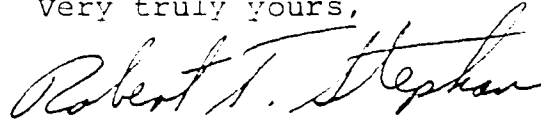
A more recent opinion, No. 82-157, spoke to the potential liability of a city in such circumstances. The result reached (i.e. potential liability) was the same, although the statutory scheme of the Tort Claims Act replaced the common-law applied in the earlier opinion. However, in that the definition of "employee" contained in the Act [at K.S.A. 1981 Supp. 75-6102(d)] includes a "servant" who worked with or without compensation, the master-servant concept, including the right to control, was found to apply to a city as well as to a non-profit charitable corporation or organization. Again, it should be emphasized that it is this right to control upon which the potential for liability is predicated. Should the city merely act as a conduit for assigning the violator to such an organization, the discretionary exemption contained in the Tort Claims Act (and cited above with regard to probation officers), would in our opinion shield a city from such potential liability.

Ed C. Rolfs
Page Five

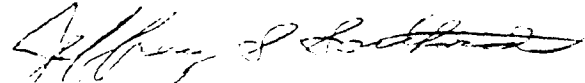
In conclusion, as amended by L. 1982, ch. 144, §5, K.S.A. 1981 Supp. 8-1567 provides that a person convicted of a violation of the offense of operating a motor vehicle while under the influence of alcohol may be required to perform public or community service work as an alternative to incarceration or payment of a fine. In assigning the work to be performed, a judge or court services division would be exercising judicial and discretionary functions, respectively, and would be exempt from liability under the Tort Claims Act, K.S.A. 1981 Supp. 75-6101 et seq. However, as noted by Attorney General Opinion Nos. 81-98 and 82-157, the recipient organization (including local governments and non-profit corporations) may be liable for injuries and damages inflicted or suffered by persons acting within the scope of their designated community service duties.

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Very truly yours,



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RTS:BJS:JSS:hle