



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 83- 139

C. L. Laman  
Cloud County Attorney  
Cloud County Courthouse  
Concordia, Kansas 66901

Re: Criminal Procedure -- Costs in Criminal Cases --  
Liability for Costs; Witness Fees

Fees and Salaries -- Fees, All Counties; Salaries,  
Certain Counties -- Liability for Costs; Witness  
Fees

Synopsis: K.S.A. 1982 Supp. 22-3801 provides that court costs, which may include witness fees, taxed against a convicted defendant in a criminal action are an enforceable judgment against the defendant. When a defendant is unable to pay witness fees and mileage, the county is obligated by K.S.A. 1982 Supp. 28-125(d) and 28-150 to pay the witness fees. After paying witnesses their statutory fees and mileage, the county may execute upon the judgment against the defendant. Cited herein: K.S.A. 1982 Supp. 22-3801, K.S.A. 22-3803, K.S.A. 1982 Supp. 28-125, K.S.A. 28-150, K.S.A. 1982 Supp. 28-172a.

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Dear Mr. Laman:

As Cloud County Attorney you have requested an opinion from the office concerning the payment of witness fees and mileage in criminal actions. Your inquiry concerns the proper method of satisfying witness fees and mileage costs which are taxed against a defendant in a criminal action who is unable to pay such costs. At the outset we note that the right of witnesses to compensation is purely statutory and

that compensation may be given only by statutory direction. See Hodges v. Lister, 207 Kan. 260, 266 (1971); Bennett v. Krath, 37 Kan. 235 (1887).

As you note, K.S.A. 1982 Supp. 22-3801(a) provides that if a defendant in a criminal case is convicted, "the court costs shall be taxed against the defendant and shall be a judgment against the defendant which may be enforced as judgments for payment of money in civil cases." We note here that K.S.A. 1982 Supp. 28-172a(d) provides that in criminal actions "[a]ll other fees and expenses to be assessed as additional court costs shall be approved by the court unless specifically fixed by statute. Additional fees shall include, but are not limited to, fees for service of process outside the state, witness fees . . . ." You specifically ask whether the county, through the Clerk of the District Court, is authorized to reimburse the witnesses and then pursue a convicted defendant through normal post-judgment remedies. In our opinion, such procedure is proper.

An earlier version of K.S.A. 22-3801(2) (L. 1978, ch. 28, §1), clearly provided that the county should pay court costs taxed against a defendant unable to pay and that the county could then execute on the judgment against the defendant seeking reimbursement. This version of K.S.A. 22-3801 provided in relevant part:

"(1) When the defendant in a criminal case is acquitted or the case is dismissed the costs incurred on the part of both the prosecution and defense shall be taxed against the county in which the prosecution was instituted. If the defendant is convicted the court costs shall be taxed against the defendant. If the defendant is unable to pay the costs taxed against the defendant, they shall be paid by the county except for that portion of the docket fee which is to be paid to the county general fund for the services of the clerk of the district court and sheriff. In all cases jury fees shall be paid by the county.

"(2) When a defendant has been convicted and costs have been taxed against the defendant, the payment of such costs by the county shall not relieve the defendant of liability for payment of costs, including the full docket fee. The costs taxed against the defendant shall be and remain a judgment against the defendant which may be enforced as judgments for payment of money in civil cases. It

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shall be the duty of the clerk of the court to issue execution for unpaid fines and costs at least once each year."

As you point out in your letter, the current version of the statute does not contain paragraph (2) and the current paragraph (1) fails to provide for the county's role when the defendant is unable to pay the court costs (including witness fees) taxed against him.

The deletion of these specific provisions from the statute in 1982 (L. 1982, ch. 116, §4) does not appear to affect the county's obligation to pay witness fees taxed to a convicted defendant who is unable to pay. On the contrary, several other statutory provisions indicate that the county is generally responsible for the payment of witness fees. For example, K.S.A. 1982 Supp. 28-125 places the general obligation to pay witnesses on the county and provides in relevant part:

"(a) Witnesses shall receive the following fees:

"(1) For attending before any court or grand jury, or before any judge, referee, or commission, \$10 per day;

"(2) for attending on an inquest, \$10; and

"(3) for each mile necessarily and actually traveled in going to and returning from the place of attendance, mileage at the rate prescribed by law if the distance is more than one mile.

. . . .

"(d) Witness fees shall be paid by the board of county commissioners where the violation of the law being investigated is alleged to have occurred." (Emphasis added.)

Another statute speaks directly to the county's obligation in a criminal case where certain fees prescribed by Chapter 28 have not been paid. K.S.A. 28-150 states:

"In all cases where the fees prescribed by this act in criminal cases for the sheriff, clerk and witnesses for the state, are not paid by the defendant or the prosecuting witness, they shall be paid by the county in which the criminal prosecution is instituted:

Provided, That no such fees shall be paid by the board of county commissioners until the sheriff shall have filed his affidavit that said fees cannot be collected from any other source. Jury fees in civil and criminal cases shall be paid by the county." (Emphasis added.)

The statutes cited above all relate to the assessment and collection of certain court costs including witness fees. When these sections are read together it is clear that the Board of County Commissioners in the county where the violation of law being investigated is alleged to have occurred shall pay witness fees. K.S.A. 1982 Supp. 28-125(d). Section 28-125(d) refers to all witnesses whether called by the State or the defense. Of course, where there is a conviction, these fees, as a portion of court costs, are taxed against a convicted defendant and become a judgment against him or her. K.S.A. 1982 Supp. 22-3801 and K.S.A. 1982 Supp. 28-172a. In criminal cases where certain fees, including state's witness fees and mileage, ultimately are not paid by the defendant or the prosecuting witness, they shall be paid by the county in which the criminal prosecution is instituted, but only after the Sheriff's affidavit has been filed. K.S.A. 28-150.

We note that statutes relating to the same subject matter are considered in pari materia and thus should be construed together and harmonized, if possible, to the end that all may be given force and effect. Clafin v. Walsh, 212 Kan. 1 (1973); City of Overland Park v. Nikias, 209 Kan. 643 (1972). Reading the relevant statutes in an effort to harmonize them and give force and effect to apparently inconsistent provisions, it is our opinion that in a criminal action the ultimate liability for witness fees, as a part of court costs, falls upon a convicted defendant by virtue of K.S.A. 1982 Supp. 22-3801. The county, however, has a general obligation to satisfy all witness fees under K.S.A. 1982 Supp. 28-125(d) and we note that as a practical matter the county will often pay those fees long before court costs are taxed to a defendant or the county. In such case the county becomes the creditor of the judgment imposed upon the defendant and may pursue normal post-judgment remedies against the defendant. Despite the fact that K.S.A. 1982 Supp. 22-3801 no longer clearly obligates the county to satisfy unpaid costs, the county is liable for witness fees by virtue of K.S.A. 1982 Supp. 28-125(d). The policy behind allowing fees and mileage for witnesses, whether called by the prosecution or the defense, is to reimburse the witnesses for their time and travel in service to the court. To insure that this policy is expressed in practical experience, the statutes place the primary obligation for witness fees on the party consistently able to pay, that is, the county.

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K.S.A. 28-150 causes some difficulty in this scheme, particularly with regard to defense witnesses, as it appears to obligate the county to pay only the state's witness fees when they are not otherwise satisfied. That section, as noted above, provides that in all criminal cases where the fees prescribed by the act for "the sheriff, clerk and witnesses for the state" are not paid by the defendant or prosecuting witness, they shall be paid by county in which the criminal prosecution is instituted. As a practical matter the county will satisfy all witness fees before costs are taxed in a criminal case. To conclude that K.S.A. 28-150 limits the county's obligation to state's witnesses would not only be inconsistent with K.S.A. 1982 Supp. 28-125(d), but also with the policy expressed by that section, and with practical experience.

When the Kansas code of criminal procedure was first enacted in 1970, Section 22-3801 (L. 1970, ch. 129) provided that all costs taxed against a defendant unable to pay should be paid by the county. We can find no indication either in the statutory language or in legislative history to indicate that the 1982 amendments to §22-3801 changed this basic policy despite the inexplicable deletion of much of the language clarifying the issue. Because K.S.A. 1982 Supp. 22-3801 is the latest expression of legislative intent on this subject, we conclude that it should control over the apparently inconsistent implications of K.S.A. 28-150. It is a settled rule of statutory construction that when an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede, repeal or supplant the earlier by implication. Richards v. Etzen, 231 Kan. 704, 707 (1982).

Therefore, in lieu of a legislative statement clearly placing the obligation for fees and mileage upon the party calling the witness, we conclude that although a convicted defendant may be held ultimately responsible for the fees, the county is generally responsible for those fees and upon payment thereof, becomes the creditor on a judgment imposed against the defendant under K.S.A. 1982 Supp. 22-3801.

As a final note, as it is the county's obligation to pay witness fees and mileage which are not otherwise satisfied, such sums should be paid as are other claims against the county. See K.S.A. 22-3803.

Very truly yours,

ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

Mary F. Carson  
Assistant Attorney General