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February 14, 1984

ATTORNEY GENERAL OPINION NO. 84- 15

Morgan Metcalf  
Butler County Attorney  
Judicial Building  
El Dorado, Kansas 67042

Re: Criminal Procedure -- Procedure After Arrest -- Diversion; Imposition of Diversion Costs

Synopsis: K.S.A. 1983 Supp. 22-2909 provides for the content of diversion agreements which are entered into by a defendant and a county or district attorney. One provision which may be included concerns the payment of restitution, including court costs and diversion costs. While the term diversion costs is not defined in the statute, it can be construed to include those specific expenses actually incurred by personnel of the county or district attorney's office in drafting and executing the diversion agreement:

Cited herein: K.S.A. 1983 Supp. 8-1567, 22-2909, K.S.A. 60-2003.

\* \* \*

Dear Mr. Metcalf:

As County Attorney for Butler County, you request our opinion as to the scope of the term "diversion costs" in K.S.A. 1983 Supp. 22-2909, which statute provides for a defendant entering a diversion agreement to pay restitution and certain other costs.

K.S.A. 1983 Supp. 22-2209 is a statute contained in the Code of Criminal Procedure section pertaining to diversion of criminal defendants. In pertinent part, the statute states:

"(a) A diversion agreement shall provide that if the defendant fulfills the obligations of the program described therein, as determined by the county or district attorney, the county or district attorney shall act to have the criminal charges against the defendant dismissed with prejudice. The diversion agreement shall include specifically the waiver of all rights under the law or the constitution of Kansas or of the United States to a speedy arraignment, preliminary examinations and hearings, and a speedy trial, and in the case of diversion under subsection (c) waiver of the right to trial by jury. The diversion agreement may include, but is not limited to, provisions concerning payment of restitution, including court costs and diversion costs, residence in a specified facility, maintenance of gainful employment, and participation in programs offering medical, educational, vocational, social and psychological services, corrective and preventive guidance and other rehabilitative services." (Emphasis added.)

You inform us that some county attorneys have employed the term "diversion costs" to provide for a defendant's payment of money which is ultimately used for salaries of office personnel and for office equipment and supplies. While you do not indicate the amount which is typically charged, you do state that it is in addition to court costs and, in cases where an offense under K.S.A. 1983 Supp. 8-1567 (driving under the influence) is involved, the required fine and evaluation assessment.

The diversion statutes do not provide guidance as to what charges are encompassed by the term diversion costs. However, in that the phrase is used in the same sentence as the more familiar term "court costs," it would be helpful to note what types of expenses are generally included within this term. As set out at K.S.A. 60-2003, court costs include:

"(1) The docket fee as provided for by K.S.A. 60-2001.

(2) The mileage, fees, and other allowable expenses of the sheriff or other officer incurred in the service of process outside of this state or in effecting any of the provisional remedies authorized by this chapter.

(3) Publisher's charges in effecting any publication of notices authorized by law.

(4) Statutory fees and mileage of witnesses attending court or the taking of depositions used as evidence.

(5) Reporter's or stenographic charges for the taking of depositions used as evidence.

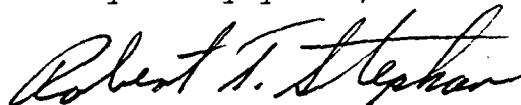
(6) Such other charges as are by statute authorized to be taxed as costs."

Although diverse in origin, each of these charges is specifically attributable to an item of expense which is incurred during the course of a judicial proceeding. Applying the same concept to diversion costs, it is our opinion that a county attorney could legitimately require a defendant to pay those expenses which stem from the negotiations leading up to, as well as the final execution of, a diversion agreement. These could include charges for evaluations of the defendant by court or county personnel and for obtaining documents necessary to determine the defendant's eligibility and suitability for diversion.

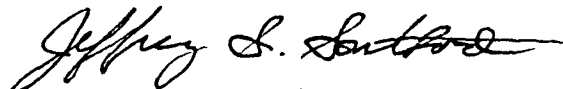
In our opinion, the term diversion costs does not include general expenses incurred by the county attorney's office such as salaries for legal or secretarial staff, office equipment or maintenance, and overhead costs. For example, we do not believe that a county attorney could require a defendant to pay a portion of the attorney's salary (for the number of hours spent in drafting the diversion agreement) or a secretary's salary (for the time spent in preparing documents). Court costs do not include charges for the salary of the judge or court personnel, and in the absence of any legislative intent we are not prepared to imply a different meaning for diversion costs. Neither court costs nor diversion costs should be used as means of raising revenue for day-to-day operations of the judicial or law enforcement system. This function is performed in part by the fines which defendants are assessed as part of the diversion agreement, and should not be augmented through the imposition of non-specific "costs."

In conclusion, K.S.A. 1983 Supp. 22-2909 provides for the content of diversion agreements which are entered into by a defendant and a county or district attorney. One provision which may be included concerns the payment of restitution, including court costs and diversion costs. While the term diversion costs is not defined in the statute, it can be construed to include those specific expenses incurred by personnel of the county or district attorney's office in drafting and executing the diversion agreement.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
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