



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

February 15, 1991

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-37
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 91- 10

The Honorable Cindy Empson
State Representative, 8th District
State Capitol, Room 182-W
Topeka, Kansas 66612

Re: Procedure, Civil -- Process -- Summons; By Whom
Served; Certified Mail by Sheriff

Procedure, Civil -- Costs -- Items Allowable as
Costs; Postage Fees Incurred Pursuant to K.S.A.
60-303

Synopsis: While postage costs might initially be incurred by
a county, K.S.A. 1990 Supp. 60-2003(6) and K.S.A.
1990 Supp. 28-110 permit certain service costs to
be taxed against and collected from parties or
attorneys utilizing a county sheriff to effectuate
such service. Cited herein: K.S.A. 1990 Supp.
28-110; 60-303; 60-2003.

* * *

Dear Representative Empson:

As State Representative for the Eighth District, you request
our opinion concerning the 1990 amendments to the service of
process procedures set forth at K.S.A. 60-303. You
specifically ask who must pay for the costs of service of
process by certified mail when such service is for a private
litigant and the mailing is handled by a county sheriff.

K.S.A. 1990 Supp. 60-303(b) provides in pertinent part:

"Except if the attorney for the party or the party, if the party is not represented by an attorney, requests personal or residence service pursuant to subsection (c); if the attorney or the party requesting service elects to serve process by certified mail pursuant to this subsection; as provided in K.S.A. 60-903, 60-906 or 60-3104, and amendments thereto; or as otherwise provided by law, the sheriff shall serve any process by certified mail, evidenced by return receipt signed by any person or by restricted delivery, unless otherwise permitted by this article. The sheriff, attorney for the party seeking service or the party, if the party is not represented by an attorney, shall cause a copy of the process and petition or other document to be placed in an envelope addressed to the person to be served in accordance with K.S.A. 60-304, and amendments thereto, adequate postage to be affixed and the sealed envelope to be placed in the United States mail as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The sheriff, the party's attorney or the party, if the party is not represented by an attorney, shall execute a return on service stating the nature of the process, the date on which the process was mailed, and the name and address on the envelope containing the process mailed as certified mail return receipt requested. The sheriff, party or the party's attorney shall file the return on service and the return receipt or return envelope in the records of the action." (Emphasis added).

The provisions of K.S.A. 1990 Supp. 60-303(b) concerning service by mail and a county sheriff have been discussed and reviewed by a noted Kansas civil procedure authority:

"The existence of these two different types of mail service was a source of some confusion. It was the thought of alleviating this confusion as well as generally improving the procedure for serving process that led the Civil Code Advisory Committee of the Kansas Judicial Council to propose the adoption of service by certified mail as an alternative form of service for most kinds of actions. Although the law that has resulted differs in some ways from the Advisory Committee's original proposal, its basic structure was retained.

. . . .

"With respect to service by certified mail, the Advisory Committee and the Judicial Council recommended providing simply that the attorney for the party seeking service, or the party if not represented by an attorney, should cause a copy of the process and petition to be sent by certified mail, return receipt requested. However, the legislature, for reasons that are not all clear, saw fit also to empower the sheriff to effect such service, and in so doing added language to the Judicial Council's proposal that is quite confusing, but seems to suggest that service by the sheriff is the preferred method of service by certified mail.

. . . .

"The opening sentence of § 60-303(b) is quite confusing. The confusion stems from mixing together in one sentence authorization for and limitations on service by the sheriff and authorization and limitations on service by certified mail. Apparently what the sentence means could be paraphrased in these words:

'The sheriff shall serve any process that is to be served by certified mail unless:

- (a) The attorney for the party or the party elect to serve it by certified mail themselves;
- (b) the attorney (or party) requests personal or residence service in accordance with § 60-303(c);
- (c) certified mail service is not permitted (as it is not in the instances referred to in § 60-903, 906 and 3104);
- (d) some other law prevents service by the sheriff or service by certified mail.'

"Why an attorney or party would want to have the sheriff rather than an employee of the law firm take the process to the post office and mail it is far from clear. If the attorney does it, he or she can be assured that the proper steps are taken and that the mail was properly addressed. That control is lacking if the task is turned over to the sheriff. It will make no difference to the defendant if a uniformed sheriff or deputy rather than a law clerk takes the process to the post office. In either case, it is the uniformed postman that actually makes the delivery of the process to the defendant. Accordingly, it seems highly unlikely that the option of having the sheriff mail the process, added to the Judicial Council's proposed bill with such confusing effect, will be used very much in practice." Casad, "Service of Process by Certified Mail", 59 JBA 25 (1990).

If, despite Professor Casad's concerns about having the sheriff mail the process, an attorney or party chooses to utilize the assistance of a sheriff for such a purpose, K.S.A.

60-2003 was specifically amended in 1990 to permit the cost of postage fees to be taxed:

"Items which may be included in the taxation of costs are:

.

"(6) The postage fees incurred pursuant to K.S.A. 60-303 or subsection (e) of K.S.A. 60-308, and amendments thereto.

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

Thus, pursuant to K.S.A. 1990 Supp. 60-2003, the cost of postage fees may be taxed. This authority appears to be in addition to the fees discussed by K.S.A. 1990 Supp. 28-110:

"The sheriffs of each county in the state shall charge for the services required by law to be performed by them the following fees:

Serving or executing and returning any writ, process, order or notice, or tax warrant, including a copy of the same, whenever a copy is required by law, except as otherwise provided, for the first person \$1.00

.

"All fees provided by this section, except those expressly given to the sheriff, are to be paid into the county general fund."
(Emphasis added).

We believe there is ample statutory authority indicating legislative intent to allow the cost of service by mail effectuated by and through the county sheriff to be recovered. While initial payment might be incurred by the

county, K.S.A. 1990 Supp. 60-2003(6) and K.S.A. 1990 Supp. 28-110 permit the cost of service to be recovered by the county.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

RTS:JLM:TMN:bas