



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 91- 26

Randall D. Grisell
Garden City Counselor
Thomas J. Burgardt
Finney County Counselor
301 N. 8th
Garden City, Kansas 67846-0499

Re: Cities and Municipalities -- Interlocal
Cooperation; General -- Interlocal Agreements by
Public Agencies; Prosecution of Violation of City
DUI Ordinance by County Attorney

Counties and County Officers -- County Attorney --
Duties; Prosecution of City Ordinances;
Interlocal Agreements

Automobiles and Other Vehicles -- Uniform Act
Regulating Traffic; Rules of the Road; Serious
Traffic Offenses -- Driving Under Influence of
Alcohol or Drugs; City Ordinance; Prosecution in
Municipal Court; Jurisdiction

Synopsis: Current statutes concerning the powers and duties
of county officials do not authorize boards of
county commissioners to enter into interlocal
agreements which unilaterally require county
attorneys or their staff to prosecute in municipal
court for violations of a municipal DUI
ordinance. If a city has enacted a DUI
ordinance, violations of that ordinance which fall
within the city's jurisdiction may be prosecuted in
municipal court. Such prosecutions may be

undertaken by an attorney authorized by the city to appear in municipal court on behalf of the city. Likewise, defense costs for indigent defendants may be paid to attorneys properly hired by the city for such purposes. Compensation paid by the city to such prosecutors or other attorneys may be contractually shared with or paid to a third party (such as a county) if that party provides contractual consideration for such payments and if the city is expending funds which may be utilized for such purposes. Attorneys involved in representation of two or more public entities must resolve potential statutory or ethical conflict of interest issues. Cited herein: K.S.A. 1990 Supp. 8-1567; K.S.A. 12-2901; K.S.A. 1990 Supp. 12-2909; K.S.A. 12-4104; K.S.A. 1990 Supp. 12-4106; K.S.A. 19-701; 19-702; 22-2401a; K.S.A. 1990 Supp. 75-4301a.

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Dear Mr. Grisell and Mr. Burgardt:

As city and county counselors you request our opinion concerning whether the county and city may, by interlocal agreement, provide for legal defense of indigent defendants and have the Finney county attorney prosecute violations of a municipal DUI ordinance in municipal court. As compensation for such services, the city would pay the county all the fines and other assessments received and normally retained by the city. The proposed interlocal agreement requires that we address the following: (1) authority of a county to assign or control prosecutorial duties of the county attorney; (2) permissibility of a county attorney prosecuting for violation of a city ordinance; and (3) jurisdictional considerations involved in prosecuting for violation of a city ordinance.

K.S.A. 12-2901 et seq. set forth the Kansas interlocal cooperation act and generally permit public agencies to contractually cooperate in performance of their powers and duties. "The extent and nature of powers and privileges that may be jointly exercised pursuant to an interlocal agreement entered into by 'public agencies' depends upon the powers and privileges enjoyed by the individual public parties. . . . In order to cooperatively exercise a power or privilege, a public agency must independently possess that power or privilege." Nuckolls, "Cooperation by Contract: Interlocal Agreements" 59 J.K.B.A. 25 (1990). Thus, in order for the

city or county to contractually exercise a power or duty (such as pursuing prosecution or providing for defense costs in municipal court) the authority to do so must first be independently vested in the party performing that power or duty.

Therefore, the first issue is whether the county can unilaterally require prosecution in municipal court by the county attorney. "[S]upervisory power over county officials is possessed by county boards only when given by statute, and then only to the extent fixed by statute; a county board may not usurp the power of any county officer specifically imposed by law, or repudiate the acts of such official within the scope of his authority. It does not have the power to perform the county officers' statutory duties for them or to direct the manner in which the duties are performed." 74 C.J.S. Counties § 74 (1990). Attorney General Opinion No. 81-205 reviewed an interlocal agreement between a city and a county which required a sheriff to enforce city ordinances. It was our opinion that the county and city were without authority to expand upon the statutorily imposed duties of a county sheriff. Following issuance of this opinion, K.S.A. 12-2909 was enacted specifically permitting such a contract, but only with the approval of the county sheriff. We are not aware of comparable statutory authority concerning the duties of a county attorney.

K.S.A. 19-701 et seq. generally establish the powers and duties of a county attorney. These powers and duties include authority to prosecute for violation of state law and ". . . to appear in any court having jurisdiction within the county. . . ." K.S.A. 19-702 (emphasis added). K.S.A. 1990 Supp. 8-1567 is the state statute authorizing prosecution of DUI offenses in district court. However, we have thus far been unable to locate authority requiring or permitting a county attorney to prosecute for violation of state law in municipal court or for violation of a municipal ordinance mirroring state law in municipal court. Thus, we do not believe a county may require the county attorney to prosecute DUI offenses in municipal court.

It may be possible for a county attorney, in his or her private capacity, to undertake prosecutorial duties on behalf of a city. If conflicts do not exist or arise, it is not uncommon for the same person to serve as a county and city attorney. See Attorney General Opinions No. 81-155 and 79-25. Unlike county attorneys, city attorneys are hired rather than elected. However, such an arrangement

(prosecution in the name of the city for violation of municipal ordinances or defense of indigent defendants) is generally entered into by the individual attorney, with the compensation for such services paid to the individual. Such a contract does not require the acquiescence or cooperation of a board of county commissioners.

Interlocals are contracts and, as such, must comport with standard contract principles such as authority to contract and consideration. A third party, such as the county, may enter into a contractual arrangement if that party has the authority to contract for that purpose and if the county provides consideration. Because a county board of commissioners does not have authority to require a county attorney to prosecute for violations of municipal ordinances, the county attorney must be made a party to the contract and the county must provide its own consideration. Such participation by the county must fall within the scope of authority vested in the county.

A second issue is whether a county attorney may place conditions upon prosecution or whether a conflict exists. Attorney General Opinion No. 84-32 discussed a county attorney attaching monetary conditions to the performance of prosecutorial duties. We concluded that the county attorney and the county had no power to require a city to pay for the costs of district court DUI prosecutions nor to require the city attorney to serve as an assistant to the county attorney for such prosecutions. Thus, it was our opinion that if a violation of state law occurred, it was immaterial whether that violation took place within or without the limits of any city located in the county. "In any violation of a state criminal statute, it is the function of the county attorney to prosecute, and said prosecutions may not be declined or additional conditions attached (i.e. payment of costs) on the grounds that the violation took place within the city." Attorney General Opinion No. 84-32. However, this opinion dealt with failure to prosecute in district court or conditions placed upon such prosecutions. The opinion did not address prosecution by the county attorney in a municipal court. A county attorney does not have a duty to prosecute in municipal court for violation of municipal ordinances. Therefore, it may be possible for a county attorney to contractually agree to serve as city attorney for prosecution in municipal court.

However, there may be some difficulties when prosecution for a violation could be brought by the same prosecutor in either

district or municipal court. State law expressly contemplates prosecution for DUI's in either court. See K.S.A. 1990 Supp. 8-1567. State v. Frazier, 12 Kan.App.2d 164 (1987), concerned a DUI defendant's claim that, because he was arrested within the limits of the city, it was the city not the county which had jurisdiction. The Kansas Court of Appeals disagreed and concluded that, pursuant to K.S.A. 12-4104, "it is obvious that the legislature did not intend to confer exclusive jurisdiction upon the municipal court for every offense which constituted a violation of a city ordinance and also a violation of a state statute." Id. at 165. If an individual violates a municipal DUI ordinance within the territorial and jurisdictional limits of the city, such prosecution may occur in municipal court. A county attorney who also serves as a city attorney may have a choice of whether to prosecute DUI violations in district court pursuant to state law or in municipal court pursuant to a municipal DUI ordinance. However, such a choice may create a conflict for the county attorney, especially if additional compensation will flow to the attorney as a result of the contract and choice made by the attorney. Such conflicts may arise on a case by case basis. See K.S.A. 1990 Supp. 75-4301a et seq. Advisory opinions from the public disclosure commission or advice from the disciplinary administrator may assist county attorneys in resolving issues concerning statutory or ethical conflict questions.

This brings us to the final and perhaps the most problematic issue, jurisdiction. K.S.A. 12-4104 provides "the municipal court of each city shall have jurisdiction to hear and determine cases involving violations of the city ordinances of the city. . . ." See also City of Tonganoxie v. Jack, 13 Kan.App.2d 718 (1989); K.S.A. 1990 Supp. 12-4106(b) (judicial authority in municipal court); K.S.A. 22-2401a (law enforcement authority of municipal officers); and Attorney General Opinion No. 83-79 (second DUI offense prosecutions in municipal court).

K.S.A. 1990 Supp. 8-1567 discusses prosecution by a city or county for DUI violations. If a city has a DUI ordinance that is violated, prosecution for such violations may be brought in municipal court. However, there are limitations upon the jurisdictional authority of a municipal court. A primary restraint is territorial. Generally stated, prosecution for violation of a municipal DUI ordinance may occur only when the violation at least in part took place within the city limits. Jurisdiction over persons violating

state DUI laws outside city limits does not vest in municipal court. See K.S.A. 12-4104. An interlocal cooperation agreement cannot extend the jurisdiction of the city or municipal court to include prosecution for violations of municipal codes which occur outside the territorial and jurisdictional limits of the city. Nor may an interlocal agreement extend jurisdiction of a municipal court to include prosecution for violation of state law.

In summary, if a violation of a municipal DUI ordinance occurs within the jurisdictional and territorial limits of a city, and that city has a properly enacted municipal DUI ordinance, it may be proper for the city to prosecute in municipal court or to provide defense for indigent defendants criminally prosecuted by the city. The attorney prosecuting or defending in municipal court may be properly compensated by the city for such services to the city. Compensation paid by the city to such an attorney may be contractually shared with or diverted to a third entity (such as a county) if there is consideration from the third party receiving such payments and if such payments may be properly expended by the city for such purposes. However, attorneys who represent two distinct public entities, both of which could benefit from separate prosecution of a DUI violation, may want to consider ethical or statutory conflict of interest principles in determining their course of conduct.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General