

STATE OF KANSAS

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July 7, 1992

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ATTORNEY GENERAL OPINION NO. 92- 87

Brad L. Jones
Coffey County Attorney
P.O. Box 310
Burlington, Kansas 66839

Re: Counties and County Officers -- County Attorney
--Duties; Opinions and Advice to County; Who is a
Civil Officer; Expenditure of Money for Legal
Counsel to County Officer or Employee who is Target
of Grand Jury Proceeding

Synopsis: The board of county commissioners has statutory authority pursuant to K.S.A. 19-723 to hire an additional attorney to perform county attorney functions if it deems such an action necessary and expedient. The additional counsel or the county attorney, whichever the case may be in that particular situation, shall give advice and legal opinions to civil officers and may give advice and legal opinions to county employees if the board of county commissioners determines that the person requesting advice has acted within the scope of their employment, the employee acted in good faith, and it is a matter which is of interest to the county. The board of county commissioners may authorize the reimbursement of legal fees incurred by the retention of independent legal counsel for a county officer or employee as long as there is a public purpose for the expenditure and the claims are presented to the board of county commissioners in accordance with K.S.A. 1991 Supp. 12-105b(a). Such an expenditure of funds should be made on a case-by-case basis to determine whether the

employee or officer was asking for reimbursement of legal fees based on actions that were within his or her scope of employment, whether the employee or officer acted in good faith and whether the services for which fees are sought concerned a matter in which the county had an interest. Cited herein: K.S.A. 12-105b(a); 19-702; 19-704; 19-723.

* * *

Dear Mr. Jones:

As Coffey county attorney you request our opinion on the following questions:

1. Can the Coffey county board of commissioners employ a special counsel to perform duties otherwise performed by the county attorney and pay such a person from the county general fund?
2. Pursuant to K.S.A. 19-704, who is encompassed by the phrase "other civil officers of the county"?
3. Is a county officer who has been identified as the target of a grand jury investigation of criminal activity entitled to legal counsel at the expense of the county during the course of the grand jury proceedings?

By way of background you have informed us that on May 12, 1992 a petition for grand jury was submitted to the clerk of the district court for Coffey county. The petition requested an investigation of alleged violations of the law by county officials and/or employees, but did not list any specific violations of law.

Newspaper articles did state that the allegations needing investigation included:

"misappropriation of county funds; allowing county employees to receive consulting fees from county contractors and suppliers; violations of the open meetings act; incomplete recordings of meetings and motions passed; use of county funds and equipment for private property improvements and distribution of economic development funds with written agreements."

Based on such information, you, as the Coffey county attorney, requested that the court agree to your withdrawal as counsel since you would be required to investigate individuals whom you have had a duty to advise, and possibly to testify. The court agreed to your request and appointed a special prosecutor.

Shortly after June 10, 1992, when the grand jury was impaneled, it became apparent to you that some or all of the county officials involved might have conflicting positions and interests and therefore you informed the Coffey county board of commissioners that you could not represent them and that they should consider retaining special counsel either for the county or for the individual county commissioners, officers, and employees. On June 22, 1992, the Coffey county board of commissioners passed Resolution No. 382 authorizing the retention of special counsel for members of the board of county commissioners and other county officials.

Based on these occurrences you have requested our opinion concerning the above mentioned questions.

1. Can the Coffey county board of commissioners employ special counsel to perform the duties otherwise performed by the county attorney and pay such person from the county general fund?

K.S.A. 19-723 authorizes the board of commissioners to:

"employ an additional attorney at law to assist the county attorney of its county in any specific investigation, prosecution or any civil or criminal matter involving the duties of said county attorney and the said board of county commissioners may pay such attorney so employed reasonable compensation for his services, the same to be charged to the general fund of said county."

In Attorney General Opinion No. 91-53 we discussed the authority of county commissions to establish a tort claims fund to reimburse county officials for certain expenditures. We quote extensively from that opinion:

"K.S.A. 19-212 provides that '[t]he board of county commissioners of each county shall have the power, at any meeting: . .

. . . Second. To examine and settle all accounts of the receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county; and when so settled, they may issue county orders therefor, as provided by law. . . . ' Through the county's home rule powers, a board of county commissioners is able to 'transact all county business and perform all powers of local legislation and administration it deems appropriate. . . ' with certain exceptions. K.S.A. 1990 Sup. 19-101a. Furthermore, K.S.A. 19-229 gives the county commissioners the 'exclusive control' of county expenditures.

"However, K.S.A. 1990 Supp. 12-105b(a) requires that 'all claims against a municipality must be presented in writing with a full account of the item, and no claim shall be allowed except in accordance with the provisions of this section.' Employees wishing payment of legal expenses are making a claim against the county for funds which are not otherwise available to them. Therefore, such employees or [officials] would need to set forth in detail the amount they are requesting.

"Through these statutes and other Kansas law the commissioners have been given broad and sweeping authority to decide how local financial matters will be handled. However, the general rule is that funds must be spent only for a 'public purpose.' Authorities discussing the public purpose doctrine include: Ulrich v. Board of Thomas County Commissioners, 234 Kan. 782, 789 (1984); Duckworth v. City of Kansas City, 243 Kan. 386 (1988); Savings and Loan Association v. Topeka, 87 U.S. 655, 22 L.Ed. 455 (1875). See also Gold, Economic Development Projects: A Prospective, 19 Urban lawyer 193 (1987); Leavenworth County v. Miller, 7 Kan. 479

(1871); and McQuillin, 15 Municipal Corporations § 39.19 (3d Ed.).

"The courts will generally defer to the commissioners' determination as to whether or not the expenditure is for a public purpose. However, the courts will step in if it is clear that the funds will only benefit a private entity. The general law governing judicial scrutiny in the application of the 'public purpose' doctrine is stated thus:

'Each case must be decided in the light of the existing conditions, with respect to the objects sought to be accomplished, the degree and manner in which that object affects the public welfare, and the nature and character of the thing to be done; but the court will give weight to a legislative determination of what is a municipal purpose, as well as widespread opinion and general practice which regard as city purposes some things which may not be such by absolute necessity, or on a narrow interpretation of constitutional provisions. When an appropriation of public funds is primarily for public purposes, it is not necessarily rendered violative of constitutional provisions against gifts and loans of public credit by an incidental result which may be of private benefit. On the other hand, if the result is chiefly that of private benefit, an incidental or even ostensible public purpose will not save its constitutionality. A purpose may be a public one so as to be within a municipal power to appropriate funds therefor, even though it is not a necessary purpose. It has been laid down as a general rule that the question whether the performance of an act or the accomplishment of a specific

purpose constitutes a 'public purpose' for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused.' Attorney General Opinion No. 82-229, 64 C.J.S. Municipal Corporations, § 1835 (1950), State ex rel., McClure v. Hagerman, 98 N.E.2d 835 (Ohio (1951))." Attorney General Opinion No. 91-53.

Therefore, if the board of county commissioners deems it "necessary and expedient" to hire an additional attorney to perform county attorney functions, the money is spent for a public purpose as determined on a case-by-case basis by the county commission, and the expenses are submitted to the county pursuant to the uniform procedure for payment of claims, then such an expenditure from the county general fund would be appropriate.

2. Is the county attorney authorized or required to give advice to county employees who are not county officials?

K.S.A. 19-704 states that it is the duty of the county attorney to "give opinions and advice to the board of county commissioners and other civil officers of the county, when requested by such board or officers, upon all matters in which the county is interested, or relating to the duties of such board of officers in which the state or county may have an interest." (Emphasis added).

The county attorney also has the duty to: "[p]rosecute or defend on behalf of the people all actions and proceedings, civil or criminal, in which the state or the county is a party or interested." K.S.A. 19-702.

An officer is distinguished from an employee by the "greater importance, dignity and independence of his or her position; in being required to take an official oath, and perhaps give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office,

and usually, though not necessarily, in the tenure of his or her position." 3 McQuillan, § 12.30 (1990).

Based on the language of statute and the general rule of statutory construction which states that "when a statute is plain and unambiguous the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be," Randall v. Seeman, 228 Kan. 395 (1980), it is our opinion that the county attorney does not have a duty to advise or give legal opinions to county employees. However, since the main duty of the county attorney is to represent the best interests of the county, the county may deem it an appropriate public purpose to advise a county employee or indemnify an employee for legal expenses when it is determined that the employee "was acting in a manner in which the corporation had an interest; . . . the acts were committed within the scope of his or her public employment and in furtherance of official duty . . . and the [employee] acted in good faith." 3 McQuillan, § 12.137.10 (1990). Such a determination will need to be made on a case-by-case basis.

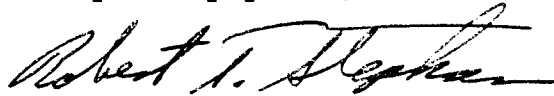
3. Is a county officer who has been identified as the target, in a grand jury investigation of criminal activity by county officers, entitled to legal counsel at the expense of the county during the course of the grand jury proceedings?

We believe the same analysis that we used in determining whether the county attorney would be required to render legal opinions and advice to county employees is applicable to county officers. Although, K.S.A. 19-704 states the county attorney shall give opinions and advice to county officers when requested, this is only applicable to "matters in which the county is interested, or relating to the duties of such board or officers, in which the state or county may have an interest." K.S.A. 19-704. Therefore, there is no duty to give advice to county officers if they are asking for advice regarding matters which are outside the scope of their employment and where the county would not have an interest in the matter. Once again this determination needs to be made on a case-by-case basis.

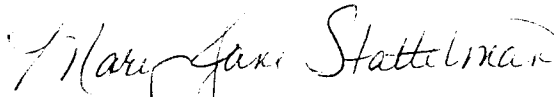
In conclusion, the board of county commissioners has statutory authority pursuant to K.S.A. 19-723 to hire an additional attorney to perform county attorney functions if it deems such an action necessary and expedient. The additional counsel or the county attorney, whichever the case may be in that particular situation, shall give advice and legal opinions to

civil officers and may give advice and legal opinions to county employees if the board of county commissioners determines the person requesting advice has acted within the scope of their employment, the employee acted in good faith and it is a matter which is of interest to the county. The board of county commissioners may authorize the reimbursement of legal fees incurred by the retention of independent legal counsel for a county officer or employee as long as there is a public purpose for the expenditure and the claims are presented to the board of county commissioners in accordance with K.S.A. 1991 Supp. 12-105b(a). Such an expenditure of funds should be made on a case-by-case basis to determine whether the employee or officer was asking for reimbursement of legal fees based on actions that were within his or her scope of employment, whether the employee or officer acted in good faith and whether the fees are sought for a matter in which the county had an interest.

Very truly yours,



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Mary Jane Stattelma
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