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ATTORNEY GENERAL OPINION NO. 92-130

Brad L. Jones
Coffey County Attorney
P.O. Box 310
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Re: Counties and County Officers -- General
Provisions-- Expenditure of Money for Legal Counsel
to County Official or Employee who has Been
Indicted on Criminal Charges

Synopsis: A county official charged with official misconduct cannot be reimbursed by the county for attorneys fees associated with the defense of those charges. If not charged with official misconduct, and if the crime charged was committed while discharging official duties in good faith or for the public benefit, the official may be reimbursed at the county's discretion. Cited herein: K.S.A. 75-6101.

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Dear Mr. Jones:

As Coffey county attorney, you request our opinion as to whether a county officer or employee who has been indicted on criminal charges related to such office or employment is entitled to legal counsel at the expense of the county during the course of the criminal proceedings.

Although Kansas law allows for the defense of officials in civil actions with some limitations through the tort claims act (K.S.A. 75-6101 et seq.), there are no Kansas statutes or cases that directly address the issue of compensation of officials in a criminal action.

The issue is discussed in 64 C.J.S. Municipal Corporations § 1837 (1950). It states:

"A municipality may not pay, nor can the legislature authorize it to pay, the expenses incurred by a public officer in defending himself against a criminal prosecution. . . ." Id. at 341.

However, a municipality may "apportion funds, . . . for the necessary expense incurred by him in defending against charges" that arise out of official duties or when the official is promoting a public purpose. Id.

Other states have addressed this matter, but there is no one definite formula for deciding such an issue. The rationale for most of the decisions was set forth in City of Del Rio v. Lowe, 111 S.W. 2d 1208 (Tex. App. 1937), reversed on other grounds 122 S.W. 2d 191 (Tex. 1938).

In Lowe three city commissioners and a city clerk were criminally charged with offenses that occurred during a "bona fide discharge of their official duties." Id. at 1218. The charges amounted to "commission of offenses against the city." Id. at 1219. The court pointed out this would mean any city funds used for the commissioners' defense would be adverse to the city's best interests. The court held that "the city's primary object should be . . . protection of its own interest . . . and it should not be permitted or required to . . . oppose itself", to protect those charged with crimes against it. Id. at 1219-20 (Emphasis added).

Based on Lowe, most states look at two factors. First, they view the crime and see if it was against the municipality and to what degree it adversely affected the municipality. Second, they look to see if the officer charged was performing his official duties or if he acted for the good of the public when he committed the alleged crime.

The states that looked at what crime is charged have consistently held one may not receive any money for their defense if they were charged with official misconduct. A very early case on this matter was Chapman v. City of New York, 61 N.E. 108 (N.Y. App. 1901). There the court found a statute which required such payments invalid. The court held that "it is not the duty of the public to defend or aid in the defense of one charged with official misconduct. The history of morals or jurisprudence recognize no such obligation." Id. at 1029. The court then pointed out that once one accepts a public office, they "assume the risk of defending [themselves]

against unfounded accusations at [their] own expense." Id.
at 110.

Not all states have decided to follow the Chapman decision. In Bowers v. City of Pontiac, 419 N.W.2d 24 (Mich. App. 1988), the court held that the city commissioner could be reimbursed for attorney fees in defense of criminal charges based on the fact the commissioner had acted in good faith and for a public purpose. Alabama allowed the payment of criminal defense costs because a city should defend against the criminal charges to avoid the liability and expense that might result from any civil litigation based on the original criminal conduct. City of Montgomery v. Collins, 355 So.2d 1111, 1114-1115 (Ala. 1978). Florida stated it was the municipality's duty to defend or pay for the defense of a public official charged with a crime if the criminal conduct arose out of his official duties. Lemelo v. City of Sunrise, 423 So.2d 974 (Fla. App. 1983).

Based on the aforementioned case law, the general rule seems to be that municipal officers cannot collect attorney's fees for their defense of criminal charges unless they pass a two part test. First, they cannot collect if they were charged with official misconduct as was set out in the Chapman case. Second, if they are not charged with official misconduct the court will look to see if the crime charged was committed during discharge of official duties. The court will also look to see if the officer acted reasonably with good faith or their actions can be shown to be for a public benefit.

If the action of the official passes these tests, then it appears within the discretion of the county commission to reimburse the official for attorney's fees.

Very truly yours,



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