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February 11, 1980

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ATTORNEY GENERAL OPINION NO. 80-38

Mr. Arno Windscheffel
Disciplinary Administrator
Room 278
Kansas Judicial Center
Topeka, Kansas 66612

Re: Attorneys at Law--Supreme Court Rules
Relating to Discipline of Attorneys--
Fees and Expenses of Witnesses in Disciplinary
Proceedings

Synopsis: Pursuant to K.S.A. 7-103, the Supreme Court has authority to adopt rules necessary for the discipline and disbarment of attorneys. Supreme Court Rule No. 216(b), providing for fees and expenses of witnesses in disciplinary proceedings, does not conflict with K.S.A. 28-125 or any other statute, and is a valid exercise of the Court's statutory authority, as well as its inherent power to regulate the practice of law in this state.

* * *

Dear Mr. Windscheffel:

Pursuant to your request of November 14, 1979, we have considered the effect of Supreme Court Rule No. 216(b), which inter alia provides for the payment of fees and other expenses of witnesses appearing in disciplinary proceedings instituted under provisions of the Supreme Court's rules governing discipline of attorneys. (See K.S.A. 1979 Supp. 7-124b.) This rule states in pertinent part:

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"Subpoena and witness fees and mileage shall be the same as in the district court. A witness shall be allowed additional actual and necessary expenses for meals and lodging if the same are approved by the Disciplinary Administrator."

You have advised that "[t]he Division of Accounts and Reports has refused payment of vouchers for witness expenses submitted pursuant to these provisions, citing K.S.A. 28-125," and you have requested our opinion as to the legality of "reimbursing witnesses in disciplinary proceedings for their actual expenses, pursuant to Rule 216(b)."

It is our opinion that this Supreme Court rule does not conflict with K.S.A. 28-125 or any other statutory provision and is a valid exercise of the rule-making powers of the Supreme Court, as a necessary extension of the Court's inherent authority to regulate the practice of law in this state, and because the reimbursement of witnesses appearing before a disciplinary hearing panel is not otherwise provided for by law.

In 1960, the Kansas Supreme Court enunciated its inherent power to regulate the practice of law by attorneys in this state. The Court had been granted statutory authority to promulgate rules for the examination of applicants for admission to the bar, but the legislature had not specifically mentioned the right of the Court to further regulate the practice of law by those admitted. At issue in Martin v. Davis, 187 Kan. 473 (1960), was the constitutionality of two Supreme Court rules which required all attorneys licensed to practice in Kansas who were regularly engaged in the practice of law in another state to associate local counsel when litigating matters in Kansas courts. A Kansas resident who practiced law in both Kansas and Missouri challenged the two rules, contending they were "vague, arbitrary and without standards" (Id. at 476) and "denied him due process and equal protection of law in violation of the Fourteenth Amendment of the Constitution of the United States." Id. at 477.

The Court explained that its power to promulgate rules regulating the practice of law by attorneys in this state was constitutionally approved:

"The constitution of Kansas distinctly distributes the powers of the government to the executive, legislative and judicial departments. Under Article 3, Section 1 the judicial power is vested in a supreme court, district courts, probate courts, justice of the peace, and such other courts, inferior to the supreme court, as may be provided by law. Under that provision of the constitution, the supreme court stands at the head of the judicial department . . . and is invested with inherent power arising from its creation, or from the fact that it is a court. Inherent power is essential to its being and dignity, and does not require an express grant to confer it. . . . It is not an arbitrary and despotic power to be exercised at the pleasure of the court, or because of passion, prejudice or personal hostility; rather, it is one to be used with moderation and caution in the exercise of sound judicial discretion. . . .

"It is unnecessary here to explore the limits of judicial power conferred by that provision, but suffice it to say the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government. . . . Included in that power is the supreme court's inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare." (Citations omitted.) Id. at 478, 479.

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The power of the Court to regulate the practice of law by attorneys in this state was legislatively affirmed in 1968. In that year, K.S.A. 7-103 was amended to extend the rule-making capacity of the Supreme Court to include regulation of "the discipline and disbarment of attorneys" as well as the power to regulate the examination and admission of attorneys to the bar (L. 1968, ch. 303, §1). Supreme Court Rule No. 216 is one of thirty court rules relating to the discipline of attorneys. It covers the areas of the subpoena power of members of the Disciplinary Board, witnesses at disciplinary proceedings, and general pretrial procedures. In July, 1979, the Court amended Rule 216(b) to allow witnesses to be reimbursed for "additional actual and necessary expenses for meals and lodging" incurred for appearing before a disciplinary hearing panel, subject to the approval of the Disciplinary Administrator.

Generally, a court cannot make a rule inconsistent with or contravening any constitutional or statutory provision or principle of general law. 21 C.J.S. Courts, §170, p. 262. However, matters of practice and procedure which are not regulated by general or special laws, or which are inadequately provided for by such laws as do exist can be regulated by court rules. 21 C.J.S. Courts, §172, p. 266. When phrased in terms of your opinion request, the issue becomes one of determining whether Supreme Court Rule No. 216(b) is in conflict with some statutory provision.

K.S.A. 28-125 provides for the payment of certain fees for witnesses attending specified proceedings:

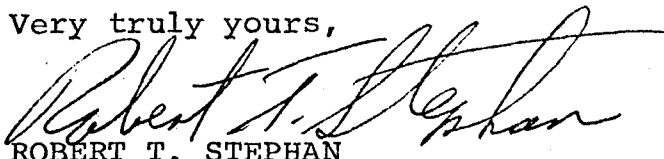
"Witnesses shall receive the following fees: For attending before any court or grand jury, or before any judge, referee, or commission, per day, five dollars (\$5); for attending on an inquest, five dollars (\$5); for each mile necessarily and actually traveled in going to and returning from the place of attendance, mileage at the rate prescribed by law: Provided, That no mileage shall be allowed where the distance is less than one mile. No witness shall receive per diem or mileage in more than one case covering the same period of time or the same travel, and each witness shall be required to make oath that the fees claimed have not been claimed or received in

any other case; and no juror shall receive pay as a witness while serving as a juror. Witnesses shall be entitled to receive, for attending before any attorney general, county attorney or assistant attorney general, under any provision, authorizing the officers to compel the attendance of such witnesses, the sum of five dollars (\$5) per day, together with mileage at the rate prescribed by law for each mile necessarily traveled in going to and returning from the place of attendance. Such fees shall be paid by the board of county commissioners where the violation of the law being investigated is alleged to have occurred."

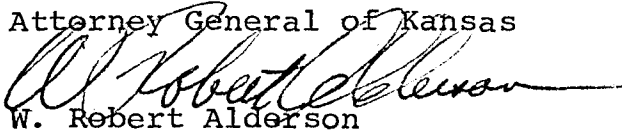
From our review of the foregoing provisions, it is clear that they have no application to proceedings held under authority of the Supreme Court's rules relating to the discipline of attorneys, and we are aware of no other statute prescribing the amount of fees and expenses to be paid witnesses in these proceedings. It also is clear that, absent any statutory statement or appropriate provision made in the Supreme Court's rules, there would be no authority to pay fees, mileage or other expenses to such witnesses.

Thus, it is our opinion that Rule No. 216(b) represents the sole authority for paying fees and expenses to witnesses in these disciplinary proceedings. We also are of the opinion that this rule is within the Court's authority circumscribed by K.S.A. 7-103, being a rule that the Court has deemed "necessary for the . . . discipline and disbarment of attorneys." Therefore, vouchers prepared for witnesses in these proceedings in accordance with Supreme Court Rule No. 216(b) should be paid by the Division of Accounts and Reports, if such vouchers are otherwise in proper form.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General