



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

August 12, 1981

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81-186

Mr. Philip D. Lunt
Pratt County Attorney
P.O. Box 425
Pratt, Kansas 67124

Re: Counties and County Officers -- County Attorneys --
Additional Compensation

Synopsis: A county attorney's regular duties include handling cases for his county in the courts of his own county. For work on cases on behalf of the county in other courts, the county attorney is entitled to charge and receive from the county all usual and reasonable fees as additional compensation, regardless of the physical presence of the county attorney in the county when the work was performed. Cited herein: K.S.A. 19-702, K.S.A. 1980 Supp. 19-703.

*

*

*

Dear Mr. Lunt:

You posed the question of whether you are entitled to all regular fees for your representation of county officers in a railroad suit pending in the Federal District Court for the District of Kansas sitting in Topeka, or only the fees for time spent working on the suit outside your county.

Mr. Philip D. Lunt
Page Two

We begin by noting several relevant statutes relating to the duties of a county attorney. K.S.A. 19-702 states:

"It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute or defend on behalf of the people all suits, applications or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party or interested." (Emphasis added.)

K.S.A. 1980 Supp. 19-703 states in relevant part:

"Each county attorney . . . shall, when requested by any judge of . . . his or her county, appear . . . and prosecute all complaints made in behalf of the state of which such judge shall have jurisdiction;"

As you have noted, there seems to be no recent case law on the subject. The latest relevant case, decided in 1944, states that county attorneys do not "have [an] obligation to render professional services to the county outside the county." They may, of course, agree to do so for extra compensation. Edwards County Commissioners v. Simmons, 159 Kan. 41, 57 (1940). Other cases have held that a county attorney is entitled to additional compensation for "any business, civil or criminal, that requires his personal attendance outside his own county." Commissioners of Leavenworth Co. v. Brewer, 9 Kan. 307, 318 (1872); Huffman v. Commissioners of Greenwood County, 25 Kan. 64 (1881). These cases, however, do not define the rule in a precise manner.

Several other cases, however, further refine the rule. Our Supreme Court has held that criminal appeals to the Supreme Court are outside a county attorney's normal duties, and he is entitled to extra compensation therefor. Heinz v. Shawnee County Commissioners, 136 Kan. 104 (1932). K.S.A. 1980 Supp. 22-3612 now codifies this rule and extends it to appeals to the Kansas Court of Appeals or other post-conviction actions arising from criminal prosecutions. It is important to note that this does not depend on the county attorney traveling or performing services outside his county. In Heinz, supra, the Kansas Supreme Court held, in regard to the issue of whether the Shawnee County Attorney was entitled to extra compensation for appeals taken to the Kansas Supreme Court, when that Court also sits in Shawnee County:

"So far as court work is concerned the official duty of the county attorney extends no further than to appear and prosecute and defend in the courts of his county. A federal court sitting in a county is not a court of that county (Nichols v. Shawnee County, 76 Kan. 266, 91 Pac 79), and the fact the sessions of this court are held in the statehouse, which is Shawnee County, does not make the court a court of the county.

. . . .

"The practice of employing the county attorney to follow criminal cases to courts other than courts of the county was in vogue in this state as early as 1875." (Emphasis supplied.) 136 Kan. at 106, 110.

In another case, factually similar to the matter at hand, the Kansas Supreme Court held that a county attorney is entitled to extra compensation for representing his county in a suit in federal court, even though the federal court was physically located in his own county. Nichols v. Shawnee County, 76 Kan. 266 (1907). The Court in Nichols framed the sole question for determination as follows:

"May a county attorney who has been employed by the board of county commissioners to represent the county in litigation in the federal courts in which the county is a party recover fees for his services performed under such contract where the federal court was held in his county?" Id. at 266.

In deciding this issue, the Court stated in relevant part:

"The question presented has been settled in favor of the plaintiff's contention and the county held liable in a case where the county attorney was obliged to attend the sessions of the federal court in another county. David J. Brewer, while county attorney of Leavenworth county, was directed by the county commissioners to perform certain services for his county in the federal court. He performed the services and the county then refused to pay him for them. He brought suit and this court held that he was entitled to recover. (Comm'rs of Leavenworth v. Brewer, 9 Kan. 307.) In that case the services were performed outside of the county, the federal court sitting at the time in Shawnee County."

. . . .

"This case is ruled by the David J. Brewer case, unless the fact that the federal court happened to sit in the county where Galen Nichols was county attorney, thus rendering it unnecessary for him to go outside his county while representing the board in the federal court, is a circumstance which calls for a different rule." 76 Kan. at 267, 268.

The Supreme Court thereafter cited the relevant statutory duties of a county attorney as provided in Gen. Stat. 1868, ch. 25, §136; Gen. Stat. 1901, §1777, which has remained unchanged, and is now K.S.A. 19-702, supra.

The Court reasoned that:

"The 'courts of their respective counties' was held in the Brewer case not to have reference to the courts of the United States. And we are of the opinion that, without extending the doctrine of that case beyond its logical conclusions, a county attorney who is directed by the county board to defend or represent his county in litigation pending in the United States court may recover for such services notwithstanding at the time the services are performed such court may be held in the same county. No matter where a court of the United States may sit, it is in no sense one of the courts of the county in which it sits. The services performed by the county attorney in the courts of the United States are not those which his duties or the law require him to perform. If the board employ or direct him to act for the county in such courts, the county is liable to him for the services he performs under such employment or direction"

. . . .

"The decisions which settle the liability of a county in cases of this character were not placed solely on the ground that the services performed obliged the attorney to go beyond the county, although in all cases heretofore decided such was the fact, and it was given most prominence. The reasoning of the cases rests, after all, upon the proposition that the services performed are not within the duties imposed by law upon the county attorney. The county attorney, in theory at least, goes beyond the realm of his official duties

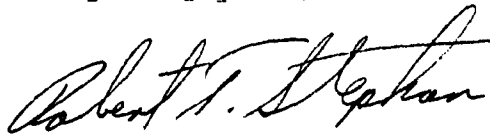
Mr. Philip D. Lunt
Page Five

when he steps into one of the courts of the United States, although it may be sitting in a building across the street from where his office is located. Nor do we feel disposed in a case of this character to split hairs over the fact that necessarily the county attorney, while preparing the pleadings and fitting himself to represent his client properly, may have performed some of his labors while in the county. He is entitled to recover a reasonable attorney's fee for his services in court, which includes compensation for the labor of preparation, and this without reference to where it is performed. . . ." 76 Kan. at 269, 270. (Emphasis added.)

From Nichols and Heinz, it is clear that the decisive factor in determining whether a county attorney is entitled to additional compensation is whether the work is for a case in a court of, not in, the county attorney's county; it does not depend on whether the county attorney is physically in the county when he performed the work.

We are aware that you and the board of county commissioners are not in agreement concerning payment for specific items billed. However, we are unable to opine as to the appropriateness of the various items and services billed. The reasonableness of the same would be a question not of law, but of fact, thus rendering such question beyond the scope of our opinion. For this reason we state only that it is our opinion that you are entitled to usual and reasonable fees for your representation of Pratt County in the United States District Court for the District of Kansas, sitting in Topeka, even though you performed such work from your office in Pratt County.

Very truly yours,



ROBERT T. STEPHAN
Attorney General



Christopher Y. Meek
Assistant Attorney General

RTS:TDH:CYM:may