



STATE OF KANSAS

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November 22, 1983

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ATTORNEY GENERAL OPINION NO. 83- 170

Ronald E. Miles  
Director  
Board of Indigents' Defense Services  
505 Kansas, Room 536  
Topeka, Kansas 66603

Re: Criminal Procedure -- Aid to Indigent Defendants;  
Payment for Attorney Services Under Act; Compensation from Other Sources

Synopsis: An attorney, appointed to represent an indigent defendant under the Kansas Indigent Defense Services Act, may accept compensation for such services from private sources as long as the attorney complies with the Act's requirements regarding such compensation. The Act requires the appointed attorney to report to the court the availability of private funds sufficient to fully pay for representation of a defendant and to seek permission to either withdraw from the case or to accept compensation. K.S.A. 1982 Supp. 22-4507 requires an attorney to report any partial compensation received to the Board of Indigents Defense Services when he or she submits a claim for compensation under the Act. K.S.A. 1982 Supp. 22-4510 does not prohibit the acceptance of such compensation as long as the attorney acts as authorized or directed under the Act. Cited herein: K.S.A. 1982 Supp. 22-4501, 22-4503, 22-4507, 22-4510, L. 1976, ch. 169; 18 U.S.C. §3006A.

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Dear Mr. Miles:

As Director of the Board of Indigents' Defense Services you have requested an opinion from this office on the question of whether an attorney, appointed to represent an indigent

defendant under the Indigent Defense Services Act, may accept compensation other than that provided by the Board under K.S.A. 1982 Supp. 22-4501 et seq. You suggest that such compensation may come from either the indigent defendants or families of such defendants.

As noted in your request, several sections of the Indigent Defense Services Act seem to apply, but fail to provide a clear answer to this question. K.S.A. 1982 Supp. 22-4503(e) provides:

"If, after the attorney's appointment, the attorney learns that the defendant has funds or other resources sufficient to enable the defendant to employ counsel, the attorney shall report these facts to the court and ask permission to withdraw from the case or to be permitted to accept compensation for services."  
(Emphasis added.)

This section indicates that an attorney appointed under the terms of the act may accept compensation from sources other than the appropriation to Board of Indigents' Defense Services if there are sufficient funds available on behalf of the defendant to fully compensate the attorney for his services. In such case, an attorney must, upon reporting the availability of funds, either withdraw from the case or receive permission to accept compensation and become, in effect, retained counsel. If sufficient funds are available to the defendant to employ counsel, the defendant can no longer avail himself of the services of appointed counsel.

K.S.A. 1982 Supp. 22-4507(b) contemplates an appointed attorney receiving partial compensation from a source other than the Board. That section provides in relevant part:

"Claims for compensation and reimbursement shall be certified by the claimant . . . . Each claim shall be supported by a written statement, specifying in detail the time expended, the services rendered, the expenses incurred in connection with the case and any other compensation or reimbursement received."  
(Emphasis added.)

The fact that an attorney has received other compensation should be considered when he or she applies for compensation from the Board in order to avoid double compensation. It does not appear, however, that an attorney is limited to compensation under the Act as long as the attorney complies with the requirement of 22-4507 and reports such partial sums to the Board when submitting a claim for the remaining compensation owed.

The provisions of K.S.A. 1982 Supp. 22-4510 are also relevant to this scheme. That section provides:

"Whenever the court finds that funds are available for payment from or on behalf of a defendant, the court shall direct that such funds be paid to the court for deposit in the state treasury to the credit of the state general fund as provided in subsection (c) of K.S.A. 22-4505 and amendments thereto, as reimbursement to the appropriation current at the time of payment, to carry out the provisions of this act. Except as authorized or directed under this act, no person or organization may request or accept any payment or promise of payment for representation or services performed for a defendant pursuant to court appointment or order." (Emphasis added.)

You specifically ask whether this section applies to attorneys and whether it thus prevents an attorney from receiving compensation from the defendant or other sources. Based on the language of the statutes alone, it appears that 22-4510 indeed does apply to attorneys but that it does not preclude compensation from other sources. That section does not provide that the only compensation available to appointed attorneys is that provided by the Board. The pivotal language in K.S.A. 1982 Supp. 22-4510 is "[e]xcept as authorized or directed under this act."

As noted above, K.S.A. 1982 Supp. 22-4503(e) clearly indicates that an appointed attorney may, under the act, seek permission from the court to accept compensation when it is discovered that the defendant has resources sufficient to employ counsel. If an attorney receives such permission his receipt of compensation from the defendant or others would be "authorized or directed under the act" and thus within the purview of K.S.A. 1982 Supp. 22-4510. As noted above, K.S.A. 22-4503 appears to apply only to cases where sufficient funds are available to the defendant to fully compensate counsel.

K.S.A. 1982 Supp. 22-4507 apparently contemplates the availability of partial compensation from other sources and requires an attorney who receives such compensation to report it to the court and the Board when submitting a claim for compensation under the act. It appears that the purpose of the emphasized portion of K.S.A. 22-4510 is to prevent the unauthorized acceptance of other compensation. It does not, by its language and reference to other sections of the act, altogether prohibit the receipt of compensation other than that provided by the Board. Nor does 22-4510 appear to require an attorney to report the availability of funds sufficient for partial compensation to the court. If the attorney does so, the court is

required to direct that such funds be paid to the court for deposit in the state treasury to the credit of the state general fund to reimburse the current appropriation to the Board. The court has no authority under 22-4510 to authorize payment of the funds to the attorney. The statute, however, only establishes the duty of the court upon finding that funds are available on behalf of a defendant and does not impose a duty upon the appointed attorney to report the availability of partially compensating funds to the court.

For example, an attorney may have accepted partial compensation before being appointed to represent the defendant under the act. Similarly, while representing the defendant, the attorney may decide to accept some partially compensating sum without violating any provisions of the Indigent Defense Services Act. In such cases, the provisions of K.S.A. 22-4507(b) protect the Board by requiring the attorney to report the acceptance of any other compensation when submitting a claim to the Board. Thus, both K.S.A. 1982 Supp. 22-4510 and 22-4507 protect the Board from the possibility of paying compensation which is not due to an appointed attorney.

We note at this point that K.S.A. 1982 Supp. 22-4510 was amended by the 1982 legislature. Before the amendments that section provided in relevant part:

"Whenever the court finds that funds are available for payment from or on behalf of a defendant, the court may authorize or direct that such funds to be paid to the appointed attorney, to any person or organizations authorized . . . to render investigative, expert or other services, or to the court or appointed public defendants fund as reimbursement to the appropriation current at the time of payment, to carry out the provisions of this act. Except as so authorized or directed, no person or organization may request or accept any payment or promise of payment for representation or services performed for a defendant pursuant to court appointment or order." L. 1976, ch. 169, §2. (Emphasis added.)

The prior version of K.S.A. 1982 Supp. 22-4510 is very similar to a provision in the federal Criminal Justice Act which provides:

"Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed

attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized . . . to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant." 18 U.S.C. §3006a(f).

This statute has been analyzed in terms of the question presented here by the District of Columbia Court of Appeals in a disciplinary proceeding involving an attorney. Matter of Dwyer, 399 A.2d 1, 13 (D.C.App. 1979). Based upon the last sentence of the federal statute cited above, an attorney was accused of the unauthorized acceptance of a fee from the family of a defendant whom the attorney was appointed to represent. Discussing the application of the statute to that situation the court said:

"The statutory provision limits the option of a court which learns that funds are available 'from or on behalf of a person furnished representation' to ordering payment of such funds either to defendant's counsel or to the Treasury in reimbursement. Assuming that in this case, respondent had indeed received the disputed payments for his own representation of Henderson, and that this had been disclosed to the trial court, the latter then would have deducted the \$1,210.00 from respondent's pending voucher of some \$1,950.00, or if this had already been disbursed, ordered respondent to send a check to the Treasury in this amount. In short, the provision of the act which respondent is charged with violating -- viz., unauthorized acceptance of a fee -- was enacted to protect the taxpayers -- not the families or friends of defendants who raise money for their legal representation. If the scheme of the statute were different, it would put a premium on the filing of dishonest affidavits of indigency and deter appointed counsel from reporting the availability of private funds to trial courts which had accepted such affidavits on their face." (Footnotes omitted.) 399 A.2d at 13.

This reasoning would apply with equal force to the Kansas statute. It can be argued that, with the 1982 amendments to 22-4510, the legislature intended to limit the compensation an appointed attorney can receive to that compensation established by the Board under the act and to require that any available funds be paid to the court. Those amendments removed the language authorizing the court to direct payment from private sources to an appointed attorney and limited such payments to the court, for deposit in the state general fund, as reimbursement to the appropriation to the Board. If, however, this was the intent of the legislature, that intent is belied by the unchanged language of 22-4503(e) and 22-4507(b) indicating that an appointed attorney may, under the terms of the act, seek and be granted permission to accept full compensation or may accept partial compensation from sources other than the Board. Moreover, the legislative history of the 1982 amendments to 22-4510 does not indicate that the purpose of the change was to limit the compensation an appointed attorney may receive to that paid by the Board; nor does the language of that statute impose any duty on an appointed attorney regarding compensation from other sources.

In some jurisdictions there is a contrary view, although there is very little authority on this subject. The general view adopted in the few available cases is that an appointed attorney must accept, as his or her exclusive compensation, the amount provided by statute or court rule. These cases, however, relate to singular fact patterns and are based upon statutory language not contained in the Kansas statutes on the subject. See Commonwealth v. Wormsley, 294 Pa. 495, 144 A. 428 (1928); Hale v. Brewster, 81 N.M. 342, 467 P.2d 8 (1970); In re L.E.C., 301 S.E. 2d 627 (W. Va. 1983); and see D.C. Code §11-2606(b).

Historically, attorneys, as officers of the court, were expected to represent indigent criminal defendants without any compensation. The statutes authorizing compensation for the representation of indigent defendants exist, in part, to relieve the financial burden of such representation upon attorneys. It would serve no purpose, and, in fact, would unduly burden the appropriation to the Board, to deny an attorney the opportunity to accept compensation for his services from a defendant or his family when it is discovered that sufficient resources are available to enable the defendant to defray some or all of the cost of representation.

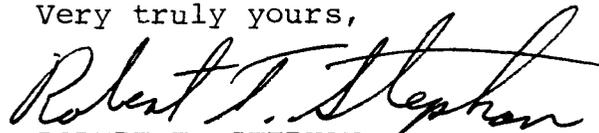
The statutory language discussed above would appear to have this argument at its foundation. The statute protects against double compensation and defrauding of the Board by requiring that the availability of fully compensatory funds be reported to the court upon discovery and by requiring an attorney to

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report any partial compensation received when submitting a claim for reimbursement to the court and the Board. The statute thus allows the Board the opportunity to set off any other compensation received by an attorney against the claim that attorney submits to the Board.

An appointed attorney's duties with regard to compensation from sources other than the Board, under the act, can be summarized as follows: K.S.A. 1982 Supp. 22-4503 requires that an appointed attorney who learns that sufficient funds are available on behalf of a defendant to employ counsel report the availability of the funds to the court. In that case the attorney either may seek permission to withdraw from the case or seek permission to accept full compensation from the defendant. K.S.A. 1982 Supp. 22-4507 requires an attorney to report to the Board the acceptance of any partial compensation from sources other than the Board when the attorney submits a claim to the Board. K.S.A. 1982 Supp. 22-4510 imposes a duty upon the court when the court learns of the availability of partially compensating funds, but apparently does not impose any duty upon an appointed attorney to report the availability of partial funds to the court. Thus there would appear to be no violation of the Act, nor of an attorney's ethical obligations to the defendant and the Board, when an appointed attorney accepts compensation from sources other than the Board as long as the attorney complies with the requirements of K.S.A. 1982 Supp. 22-4503 and 22-4507.

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
Mary F. Carson  
Assistant Attorney General

RTS:BJS:MFC:hle