



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 89- 105

Mr. Delton M. Gilliland
Osage County Counselor
112 E. 7th, P.O. Box K
Lyndon, Kansas 66451

Re: Fees and Salaries -- Fees in All Counties and
Salaries in Certain Counties -- Disposition of Fees
and Compensation Not Authorized to be Retained by
Officers and Employees; Diversion Fees

Criminal Procedure -- Kansas Code of Criminal
Procedure; Procedure After Arrest -- Provisions of
Diversion Agreement; Disposition of Diversion Fees

Counties and County Officers -- County Attorney --
Fees, When; Diversion Fees

Synopsis: The county attorney should not retain control of
fees received pursuant to a diversion agreement
except as authorized by the board of county
commissioners in accordance with proper budgetary
procedures. Such fees should initially be paid
over to the county treasurer pursuant to K.S.A.
28-175. Cited herein: K.S.A. 1988 Supp. 8-1567,
as amended by L. 1989, ch. 38, §42 and L. 1989, ch.
92, §16; K.S.A. 19-705; 22-2906; 22-2907; 22-2909,
as amended by L. 1989, ch. 95, §6 and L. 1989, ch.
38, §47; K.S.A. 1988 Supp. 28-170; 28-170a;
28-170b; 28-172b; K.S.A. 28-175.

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Dear Mr. Gilliland:

As Osage County Counselor you request our opinion concerning funds received from criminal defendants pursuant to diversion agreements. You specifically ask that we address the following:

"1. Who is the proper custodian of fees so collected, the County Attorney, or the County Treasurer?

2. Is it proper for a County Attorney to retain custody of funds collected pursuant to diversionary agreements exclusive of the County Treasurer?

3. Is it proper for the County Attorney to directly make expenditures of such funds without the approval or order of the County Commissioners?

4. Is the receipt and expenditure of such funds by the County Attorney in excess of receipts and expenditures authorized by the budget adopted for the current year in violation of the State's budget law?

5. For what purposes is it proper for the County Attorney to spend funds comprised of fees collected from criminal defendants entering into diversionary agreements?"

K.S.A. 22-2907 permits prosecutors to offer diversion to certain criminal defendants. K.S.A. 22-2906 defines diversion and diversion agreement:

"(3) 'Diversion' means referral of a defendant in a criminal case to a supervised performance program prior to adjudication.

(4) 'Diversion agreement' means the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against him or her dismissed."

K.S.A. 22-2909(a) discusses certain provisions which may be contained in the diversion agreement:

"The diversion agreement may include, but is not limited to, provisions concerning payment of restitution, including court costs and diversion costs, residence in a specified facility, maintenance of gainful employment, and participation in programs offering medical, educational, vocational, social and psychological services, corrective and preventive guidance and other rehabilitative services." (Emphasis added).

If the diversion agreement is in lieu of further criminal proceedings under K.S.A. 1988 Supp. 8-1567, as amended, K.S.A. 22-2909(c) discusses fines under that statute. The statutes clearly authorize the payment of fees by a criminal defendant who enters into a diversion agreement. Thus, when entering into a diversion agreement, a prosecutor may include requirements concerning the payment of fees by the criminal defendant. The issue becomes how to properly characterize and handle the fees thus received.

The statutes do not define or characterize these fees as compensation to the prosecutor. Rather, they are assessed as payment for fines, restitution, court costs, or diversion costs. Many statutes discuss the disposition of fees collected pursuant to criminal proceedings. See e.g., K.S.A. 28-170 (the clerk of the court shall remit a portion of court costs payments to the state treasurer); K.S.A. 1988 Supp. 28-170a (the clerk of the court shall pay a portion of docket fees to the county treasurer for the prosecuting attorney's fund); and K.S.A. 1988 Supp. 28-172b (the clerk of the court shall pay a portion of the docket fee to the state treasurer for the indigent defense services fund).

The statutes do not specifically discuss the proper disposition of all fees and moneys received pursuant to a diversion agreement. However, K.S.A. 28-175 provides:

"County officers and employees shall receive no compensation, tips, fees, mileage or salaries, which compensation, tips, fees, mileage or salaries are or shall be paid to such officer or employee directly or indirectly by reason of his or

her performance of the duties or obligations of such county office or employment, unless such compensation, tips, fees, mileage or salaries are specifically allowed to them by law. All such compensation, tips, fees, mileage or salaries received, directly or indirectly by them or from their respective offices from any source whatsoever, which compensation, tips, fees, mileage or salaries would not have been received except for such officer's or employee's performance of the duties or obligations of such county office or employment, including all notary fees collected by any officer, deputy or clerk in any proceeding pending or to become pending, filed or to be filed in said office, not specifically authorized to be retained by them, shall be paid over on the first and fifteenth days of each month, or if either of said dates be a Sunday or legal holiday, then on the next secular day, to the county treasurer accompanied by a sworn statement in such form as the board of county commissioners may prescribe, to the effect that all compensation, tips, fees, mileage and salaries collected are correctly set forth therein. All such compensation, tips, fees, mileage and salaries shall be placed by said treasurer to the credit of the county general fund." (Emphasis added).

All funds which come into the hands of a public officer in Kansas by virtue of their office belong to the state or some political subdivision of the state and are "public funds". Mermis v. Jackson, 93 F.2d 579 (10th Cir. 1937).

K.S.A. 19-705 gives further direction to county attorneys concerning fees from individuals:

"No county attorney shall receive any fee or reward from or on behalf of any prosecutor or other individuals, except such as are allowed by law for services in

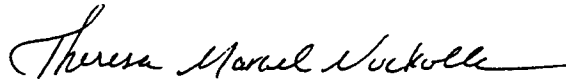
attend. . . ." See also Attorney
General Opinion No. 88-50.

Thus, unless specifically allowed to them by law, fees received by county attorneys as a result of performance of their official duties should be considered public funds and thus, pursuant to general county procedures regarding the proper procedures for handling public funds, should be paid over to the county treasurer. We find no specific statutory or common law exempting diversion fees from the provisions of K.S.A. 28-175 or K.S.A. 19-705. It is therefore our opinion that the county treasurer is the proper custodian of diversion fees. Such fees are not controlled by the county attorney unless such control is authorized by the board of county commissioners. Diversion fees should be paid over as directed under K.S.A. 28-175, credited to the general fund, and thenceforth handled in accordance with budgetary procedures applicable to all moneys deposited in the county general fund.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

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