



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 7

Mr. Gene Porter
Barton County Attorney
Barton County Courthouse
P.O. Box 881
Great Bend, Kansas 67530

Re: Public Health -- Controlled Substances;
Forfeitures; Procedure -- Forfeitures of Property;
Disposition of Proceeds; Retention of Fee by County
or District Attorney

Counties and County Officers -- County Attorney --
Duties; Fees, When Allowed

Synopsis: K.S.A. 19-705, 28-175 and general definitions of
the term "costs" preclude the district or county
attorney from retaining a portion of the sale
proceeds as a fee for services rendered pursuant to
K.S.A. 65-4173. Cited herein: K.S.A. 19-701;
19-705; 28-175; K.S.A. 1988 Supp. 65-4135; 65-4156;
65-4171; 65-4173.

* * *

Dear Mr. Porter:

As Barton County Attorney you request our opinion on the
following:

"Does the language of K.S.A. 65-4173 authorizing payment of
the costs incurred by a County or District Attorney in a
drug-related forfeiture action permit a County or District

Attorney to retain a portion of the sale proceeds as a "fee" for services rendered?"

K.S.A. 1988 Supp. 65-4171 et seq. provide for forfeiture of property under K.S.A. 1988 Supp. 65-4135 or 65-4156. Once such a forfeiture occurs and forfeited property is sold, K.S.A. 1988 Supp. 65-4173 sets forth how any moneys or proceeds from sales shall be applied:

"first, to payment of the balance due on any lien preserved by the court in the forfeiture proceedings; second, to payment of the cost incurred by the seizing agency in connection with the storage, maintenance, security and forfeiture of the property; third, to payment of the costs incurred by the county or district attorney or attorney for the law enforcement agency approved by the county and district attorney to which the property is forfeited; and fourth, to payment of costs incurred by the court."
(Emphasis added).

Thus, as you note, the issue becomes whether the statutory authorization of payment of "costs" includes "not only necessarily incurred litigation expenses, but also a fee for services rendered."

As discussed in Attorney General Opinions No. 89-102, 89-105, 88-28, 84-32, 81-186, 73-367 and 61-27, a county attorney must perform certain statutorily required services or duties. K.S.A. 19-701 et seq. generally establish the office of county attorney and discuss the duties and authority of that county official. In addition to K.S.A. 19-701 et seq. specific statutory authority may expand the services required of a county attorney. For example, K.S.A. 1988 Supp. 65-4171(a) provides that the county or district attorney, or such attorney as employed the law enforcement agency, shall when appropriate proceed with a forfeiture case. Thus, if a county or district attorney represents the county in a forfeiture proceeding, that representation results from the performance of an official duty.

K.S.A. 19-705 prohibits a county or district attorney from receiving fees for the performance of official duties or services rendered to the county, unless otherwise specifically allowed by law. See also Attorney General Opinions No.

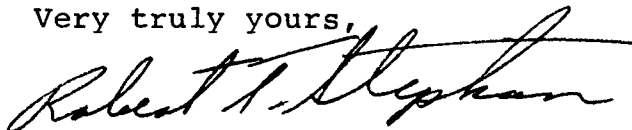
88-50 and 87-179. K.S.A. 28-175 further provides that no county officer or employee shall receive fees paid to such an officer by reason of his or her performance of the duties or obligations of the county office, unless such fees are specifically allowed to them by law. The issue therefore becomes whether K.S.A. 1988 Supp. 61-4173 specifically authorizes the county or district attorney to retain a fee for the performance of official duties connected with forfeiture cases.

K.S.A. 1988 Supp. 65-4173 authorizes the recovery of "costs incurred." "Costs" is defined as "a pecuniary allowance, made to the successful party . . . for his expenses in prosecuting or defending an action . . . generally, 'costs' do not include attorney fees unless such fees are by a statute denominated costs or are by statute allowed to be recovered as costs in the case." Blacks Law Dictionary 312 (5th ed. 1979). By comparison, "fee" is defined as "a charge fixed by law for services of public officers or for use of a privilege under control of the government. [citation omitted] A recompense for an official or professional service or a charge or emolument or compensation for a particular act or service. A fixed charge or prerequisite charged as recompense for labor; reward, compensation, or wage given to a person for performance of services or something done or to be done." Id. at 553. "In the absence of a valid and applicable statute, agreement or stipulation expressly authorizing the allowance or taxation of attorneys fees as costs, they are not allowable or taxable as costs and are not included within the word costs as used in a statute. . . ." 20 C.J.S. Costs § 218 (194). The costs of reasonable expense of litigation may include attorneys fees when such fees are specifically permitted by statute. See Cooper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1098 (C.A. Tex. 1982). Absent such a statutory provision, costs do not generally include attorneys fees. Moreover, because such fees would be recovered for the performance of an official duty, K.S.A. 19-705 and 28-175 could preclude retention of such fees by the county attorney.

It is our opinion that that pursuant to the general definition of the term "costs" and the failure of the statutes to specifically provide that "costs incurred" include attorneys

fees, K.S.A. 1988 Supp. 65-4173 does not permit the district or county attorney to retain a portion of the sale proceeds as a fee for services rendered.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

RTS:JLM:TMN:bas

KSA 65-4173
has changed
to specifically
allow for
atty. fees - to
be paid into
a special
trust fund.