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February 7, 2025

ATTORNEY GENERAL OPINION NO. 2025-4

Mark Hagen
Linn County Counselor
8655 College Boulevard
Overland Park, KS 66210

Re: Counties and County Officers—County Attorney—Opinions and Advice
to County

Counties and County Officers—County Commissioners—County
Counselor

Synopsis: When a county has established the position of county counselor and there is a temporary vacancy in that position, a county attorney is not prohibited from receiving a fee in addition to the county attorney's salary for performing the duties of the county counselor on an interim basis. Cited herein: K.S.A. 19-247; 19-248; 19-702; 19-704.

* * *

Dear Mr. Hagen:

As Linn County Counselor, you ask whether a county is prohibited from paying its county attorney hourly fees when acting as county counselor on an interim basis. Your question arises because last year, the previous county counselor resigned, and the county attorney served as interim county counselor for approximately 30 days.

Answering your question requires an analysis of the statutes governing county attorneys and county counselors. K.S.A. 19-704(a) provides:

Except as otherwise provided in this section,¹ the county attorney shall *without fee or reward*, give opinions and advice to the board of county commissioners and other civil officers of the county, when requested by such board or officers, upon all matters in which the county is interested, or relating to the duties of such board or officers, in which the state or county may have an interest.²

And K.S.A. 19-702(a) stipulates that “it shall be the duty of the county attorney to appear in any court having jurisdiction within the county and prosecute or defend on behalf of the people all actions and proceedings, civil or criminal, in which the state or the county is a party or interested.”³ The Kansas Supreme Court has long held, going back to its 1872 decision in *Commissioners v. Brewer*,⁴ that:

[W]henever the law requires the county attorney to perform any particular service or duty, he cannot receive or recover any compensation for the performance of such service or duty in addition to his salary and the specific fees allowed by statute. His salary is intended to be sufficient compensation for the performance of all services and duties required by law, except where the statute otherwise specifically provides for other or additional compensation.⁵

Counties may choose to (but are not required to) establish the position of county counselor.⁶ As Attorney General Opinion 80-121 explained, upon appointment of a county counselor “all duties in civil matters otherwise required by law of the county attorney pass to the county counselor.” K.S.A. 19-247 provides that a county counselor shall:

(a) When requested by the board of county commissioners or when necessary, attend the meetings of such board;

¹ The exception in subsection (b) involves opinions and advice regarding the county hospital.

² Emphasis added.

³ This statute also excludes representation relating to operation of the county hospital.

⁴ 9 Kan. 307 (1872). The plaintiff in the case was David J. Brewer, who was suing to recover compensation for legal services performed while he was Leavenworth County Attorney. Brewer had joined the Kansas Supreme Court by the time of the lawsuit (although he did not participate in the Court’s decision). He later went on to serve as a Justice on the U.S. Supreme Court.

⁵ *Id.* at 317-18.

⁶ As Attorney General Opinion 80-121 noted, the appointment of a county counselor was previously authorized by K.S.A. 19-246, but that statute was repealed in 1975. Appointment of a county counselor is now based on a county’s home rule authority, *see* K.S.A. 19-101a, although the duties of a county counselor, once appointed, remain enumerated in K.S.A. 19-247.

(b) give advice upon all legal questions that arise and assist the board on all legal matters referred to the county counselor;

(c) commence, prosecute or defend, as the case requires, all civil suits or actions in which the county is interested and represent the county generally in matters of civil law;

(d) draw all contracts and other papers required by the board of county commissioners and furnish to the board, when requested by it, opinions in writing upon legal matters pending before the board;

(e) if applicable, perform the duties provided by K.S.A. 19-716, and amendments thereto; and

(f) perform all the duties in civil matters that have previously been required by law of the county attorney of the county.

K.S.A. 19-248 states that “[u]pon and after the appointment of such county counselor, the county attorney of such counties shall not be required to represent said counties in any civil actions or business,” with the exception of tax foreclosure suits in certain counties.

Thus, if a county has not established the position of county counselor, a county attorney may not accept a fee (apart from his or her salary as county attorney) for representing the county in civil matters as required by statute. But we believe a different analysis applies when a county has chosen to establish the position of county counselor and the county attorney is performing the duties of the county counselor on an interim basis due to a temporary vacancy in that position. In that situation, the civil duties of the county attorney have passed to the office of the county counselor. As long as the board of county commissioners has not abolished the office of county counselor, but rather is seeking to fill a temporary vacancy in that position, we do not believe the statutory duties of the county counselor revert to the county attorney. And so the county attorney is not prohibited from accepting an additional fee for performing those duties on an interim basis. As the Kansas Supreme Court explained in *Brewer*:

[W]here the county attorney performs services for the county which are not required of him by law, he may be paid therefor by the county the value thereof as though he were not the county attorney; and the county board may contract with him for the performance of such services as are not required of him by law, in the same manner and to

the same extent as they could contract with any other person for the performance of such services.⁷

This conclusion is consistent with Attorney General Opinion 92-67. There, Attorney General Stephan recognized that upon appointment of a county counselor, the county counselor and not the county attorney would bear statutory responsibility for civil proceedings such as child in need of care cases, forfeiture cases, involuntary commitment proceedings, and habeas corpus matters. But because county counselors are often hired for the primary purpose of providing legal advice and handling contractual matters, not trial work, Attorney General Stephan recognized that “it is reasonable that some counties which have a county attorney and a county counselor may wish to enter into a contract wherein the county attorney would handle all duties except advising the board of county commissioners and handling contractual matters.”⁸ In other words, it is permissible for a county attorney to enter into a contract to perform certain duties assigned to the county counselor. Likewise, we believe a county attorney may enter into a contract to perform the duties of county counselor on an interim basis due to a temporary vacancy in that office.

Our conclusion is also supported by practical considerations relating to the county attorney’s salary. Since 1976, county attorney and county counselor salaries have been set by locally elected boards of county commissioners under county home rule authority.⁹ In counties without a county counselor, the county attorney’s salary should encompass compensation for the county attorney’s civil duties, so it would be inappropriate for the county attorney to receive an additional fee for performing those duties. But in counties with both a county attorney and a county counselor, the county attorney’s salary as set by the board of county commissioners will have only been designed to provide compensation for those duties that have not passed to the county counselor. In fact, Attorney General Opinion 85-147 concluded that it would be permissible for a board of county commissioners to reduce a county attorney’s salary following the establishment of the position of county counselor to reflect the fact that going forward, the county attorney’s salary would only provide compensation for handling criminal matters. Thus, when a county has established the position of county counselor and the county attorney performs the civil duties of the county counselor on an interim basis due to a vacancy in that office, it makes sense to provide the county attorney with additional compensation for performing those duties.¹⁰

⁷ 9 Kan. at 318.

⁸ Attorney General Opinion 92-67.

⁹ See Attorney General Opinion 81-86. Before 1976, county attorney salaries were set out in K.S.A. 28-816, while K.S.A. 19-249, 19-249a, and 19-249b provided for the salaries of county counselors. K.S.A. 22a-105 continues to set the minimum salary for district attorneys.

¹⁰ This opinion only addresses the situation where a county attorney performs the duties of the county counselor on a temporary basis. We note that in Attorney General Opinion 74-337, Attorney

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Dwight R. Carswell

Dwight R. Carswell
Deputy Solicitor General

General Miller concluded that a county attorney could be appointed as county counselor and receive the salaries of both offices. We express no opinion on that conclusion, which is arguably inconsistent with K.S.A. 19-705 (“nor shall any county attorney while in office be eligible to or hold any judicial or other county office whatsoever”), a statute that was not addressed in that opinion.