

EXPERT WITNESSES: A prosecuting attorney in a third class county operating under the county budget law may include in his estimated budget of expenditures an item for the payment to proposed expert witnesses for work necessary to be done by them before testifying on behalf of the state in criminal cases.

January 20, 1950

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Honorable Lane Harlan  
Prosecuting Attorney  
Cooper County  
Boonville, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion on the following matter:

"Does the prosecuting attorney of a third class county (operating under the County Budget Law) have the authority to place in his budget an estimate of fees for possible expert witnesses which he may need in the prosecution of criminal cases?"

On January 24, 1949, this department rendered an opinion holding that:

"A state witness, testifying as an expert witness, can only claim the ordinary witness fee, and cannot refuse to give testimony because he has not previously been tendered a fee as an expert witness."

The cases cited in this opinion (a copy of which is enclosed) hold that an expert witness can only receive the ordinary witness fee for testifying, even though his testimony is in part or in whole in that field in which he is an expert. However, it will be observed that these cases also hold that such an expert witness cannot be required to do any work in his field prior to testifying in order to better qualify him to testify, unless he is tendered compensation in addition to the regular witness fee for so doing. This is also the holding of the court in the case of Barnes v. Boatmen's National Bank of St. Louis, Missouri, 156 S.W.(2d) 597. The law upon this point may be considered to be well settled.

The next question, therefore, which we must answer is, whether a county of the third class, operating under the County Budget Law, may spend county funds to pay a proposed witness for doing work prior to testifying in order to prepare himself to testify as an expert state witness?

Mon. Lane Harlan

Upon this question we have not been able to find, and do not believe that there are, any Missouri cases directly in point. We must, therefore, look to the general grant of power given to county courts under the County Budget Law, and try to determine whether it is sufficiently broad to enable the court to make such an expenditure.

Section 10914, Mo. R.S.A. 1939, states:

"The court shall show the estimated expenditures for the year by classes as follows:

"Class 1. Care of paupers declared by lawful authority to be insane (in state hospitals).

"Class 2. Expense of conducting circuit court and elections, not to include the salary of any officer or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class 2 shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years.

"Class 3. Repair, upkeep and construction of roads and bridges on other than state highways and not in any special road district. List roads and bridges to be constructed.

"Class 4. Pay or salaries of officers and office expense. List each office separately and the deputy hire separately.

"(County clerk shall prepare estimate for the county court but his failure does not excuse the court.

"Class 5. Contingent and emergency expense.-- The county court may transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses. Purposes, for which the court proposes the funds in this class shall be used, shall be shown.

Hon. Lane Harlan

"Class 6. Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest: Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

It will be observed that in Class 4 above the statement is made that:

"Pay or salaries of officers and office expense. List each office separately and the deputy hire separately."

It seems to us that under this class the county court would be authorized to make such an expenditure as is contemplated in the instant case.

Also we would call your attention to Section 10917, Mo. R.S.A. 1939, which section reads, in part:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an

Hon. Lane Harlan

opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. \* \* \*

This section, we believe, gives the county court considerable powers of discretion in making expenditures of county funds. The section has been construed in the case of Bradford v. Phelps County, 210 S.W. (2d) 996. In that case the prosecuting attorney of Phelps County, a third class county operating under the county budget law, submitted to the county court in his estimated budget of expenditures for the year 1946, the item of \$900.00 for stenographic services. This item the court reduced to \$600.00. The prosecuting attorney appealed from this order to the circuit court, which found in his favor. The county appealed to the Missouri Supreme Court which reversed the holding of the circuit court and held that it was within the jurisdiction of the county court to reduce the \$900.00 item to \$600.00. In that portion of the opinion in which it discussed the discretionary powers of the county court the Supreme Court said: (l.c. 999 and 910)

"\* \* \*It is evident from the language of the County Budget Law that county courts in complying with the Law have duties of a discretionary nature in examining, revising and changing the estimates of the county's expenditures to the end of promoting the standard of 'efficiency and economy in county government,' Section 10917, supra. In giving such discretionary managerial powers and duties to the county courts, the Legislature has not provided an appeal whereby a circuit court may review the county court's acts in the exercise of its discretion and whereby the circuit court can substitute its own independent judgment. See again and compare State ex rel. Dietrich v. Tausch, supra.

"No statute makes provision for a salary for the stenographer of the plaintiff, prosecuting attorney of Phelps County, as did a statute determine the amount of the salary of the plaintiff county judge in the case of Hill v. Buchanan County, 346 Mo. 599, 142 S.W. (2d) 665; consequently the county court, acting under the County Budget Law, in changing Prosecuting Attorney's estimate was not voiding a



Hon. Lane Harlan

mandatory obligation imposed by the Legislature, the same authority which imposed the budget requirements. In our case the county court was acting in the exercise of a discretionary power, purposing efficient and economic county government somewhat like the county court was exercising a delegated legislative and discretionary power to allow such compensation "as may be deemed just and reasonable" for the services of the county treasurer according to the language of statute considered in the case of *State ex rel. Dietrich v. Daues*, supra, and the statute involved in *State ex rel. Dwyer v. Nolte*, 351 Mo. 271, 172 S.W. 2d 354. As was the county court in the *Daues* case exercising discretion in reducing the compensation to the county treasurer to an amount which it deemed 'just and reasonable' (the standard stated in the statute involved in that case) so was the county court in the case at bar, in examining, revising and changing the estimates as required by the County Budget Law, exercising discretionary action in the public interest and with the purpose of promoting 'efficiency and economy in county government.'

"Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see *Laws of Missouri, 1945*, pp. 574, 578, and 583, Mo. R.S.A. Secs. 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be avail-

Hon. Lane Harlan

able for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. To put it in another and surer way--since prosecuting attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make. County Budget Law, supra, particularly Sections 10912 and 10917."

In view of the above, therefore, it is our opinion that a county court may expend county funds for the purpose contemplated in the instant case, i.e. the payment of money to a proposed expert witness for the purpose of preparing himself to testify on behalf of the state in a criminal case.

Our next and final question is whether a prosecuting attorney may include such an item in his estimated budget of expenditures. In this respect we call your attention to a portion of the opinion from the Bradford case, cited above:

"Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see Laws of Missouri, 1945, pp. 574, 578, and 583, No. R.S.A. Secs. 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government.

Hon. Lane Harlan

To put it in another and summary way-- since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make. County Budget Law, supra, particularly Sections 10912 and 10917."(Emphasis ours)

Under the above we believe that a prosecuting attorney may include in his budget of estimated expenditure an item for the payment of a proposed expert witness for work done or to be done in order to prepare himself to testify on behalf of the state in a criminal case. Certainly one of the most important functions of a county government is enforcement of the law. The county government stands between the law-abiding citizens of its county and those persons who would commit outrages and depredations upon them. When a crime is committed it is the duty of the county, operating through the proper county officials, to promptly and energetically seek out and prosecute with the utmost efficiency the perpetrator of the crime. It is a matter of common knowledge that in many cases effective prosecution of such criminals depends, wholly or in large part, upon the testimony of expert witnesses, and it is equally well known that such witnesses generally must, if their testimony is to be of any value, do some work on the case prior to testifying. If the county is forbidden to use county funds to pay for such preliminary work many such criminals would be acquitted who would otherwise be convicted, and who, in the interest of the general welfare, should be convicted. We do not believe that Missouri law contemplates that the hands of the county should be so tied, and that it should in this way be rendered defenseless against the enemies of its citizens.

We do believe, however, that such an item in the budget of the prosecuting attorney, as is here contemplated, should not be designated "fees for expert witnesses" as you seem to intend doing, for the reasons discussed in the first part of this opinion, but rather that the item should be designated "fund for criminal investigation."

#### CONCLUSION

It is the opinion of this department that a prosecuting attorney in a third class county operating under the county budget law may include in his estimated budget of expenditures an item

Hon. Lane Harlan

for the payment to proposed expert witnesses for work necessary to be done by them before testifying on behalf of the state in criminal cases.

Respectfully submitted,

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J. P. TAYLOR  
Attorney General

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