

## **Opinion No. 60-224**

December 9, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Mr. Benjamin F. Dick Assistant District Attorney Second Judicial District Bernalillo County Court House Albuquerque, New Mexico

### **QUESTION**

#### QUESTION

Assuming that the necessary requirements are met, can the State Board of Finance legally authorize the transfer of funds of the State Court Fund to pay the fee of an auditor employed to audit books to obtain evidence in the preparation of a criminal case for trial in a district court?

#### CONCLUSION

See analysis.

### **OPINION**

#### **{\*647} ANALYSIS**

The County Court Fund was established by Laws of 1893, Chapter 61, as amended by Laws of 1929, Chapter 73, to be used for the "expenses of the district court," including salaries and expenses chargeable to the Court Fund as provided by law. See Section 16-3-22, N.M.S.A., 1953 Compilation. The County Court Fund has a variety of uses, including payment for meals and lodging for jurors, Attorney General's Opinion No. 1769, September 28, 1937; payment of office rent for the district attorney, Attorney General's Opinion No. 3383, Report of the Attorney General, 1940, page 130; and payment of salary to the district court clerks, Attorney General Opinion No. 4708, May 8, 1945. When the County Court Fund has been budgeted for all of these various expenses necessary to the administration of justice, it is easy to see that there may come a time when no money is left to meet the expenses of criminal trials, such as witness fees, jury expenses, and the expenses of gathering evidence.

In order to provide for that contingency, the Legislature enacted Chapter 10, Laws of 1931, entitled: "An act providing for the levy of a state tax to provide funds for holding court in the various counties of the state for the trial of criminal cases where such counties have levied the maximum tax, which fails to provide sufficient funds, and to provide for the manner of the disbursement of such state funds." This chapter is compiled as § 16-3-26 to § 16-3-29, N.M.S.A., 1953 Compilation. Reference to § 16-3-27 reveals that the State Court Fund is to be used for the trial of criminal cases only,

and the state tax to raise the State Court Fund can only be levied if it shall appear from the budget presented to the State Tax Commission that the amount of money required for the trial of criminal cases in any county will exceed the amount that can be produced from the levy of the Court Fund tax in that county. (We add, parenthetically, that the Court Fund budget is no longer submitted initially to the State Tax Commission, but is now submitted to the Local Government Division of the Department of Finance and Administration, and the budget as approved by the Local Government Division is then submitted to the State Tax Commission. See § 11-2-62, N.M.S.A., 1953 Compilation, and Attorney General's Opinion No. 58-85, April 24, 1958.) If the amount required for the trial of criminal cases will exceed the county tax, then the State Tax Commission is to compute the amount required in the various counties in excess of the amount that "can be raised and will be available" through the county tax, and levy a state tax sufficient to raise that amount. We think that when the Legislature used the words "can be raised and will be available", it anticipated that part of the County Court Fund would be used for court purposes other than the trial of criminal cases, and that those other purposes should first be budgeted against the County Court Fund to determine the amount that "will be available" for the trial of criminal cases. If it then appears that the expenses of criminal trials will exceed the residue of the County Court Fund, the State Tax Commission is authorized to levy a tax to raise the excess amount. That amount, when raised, is kept in a separate fund by the State Treasurer, and is known as the State Court Fund.

Disbursement of the State Court Fund is governed by § 16-3-28, N.M.S.A., 1953 Compilation, which provides:

**"The state finance board upon such showing as may be {\*648} by it required shall certify to the state auditor the amount which may be required in any county for the purposes in this act (16-3-26 to 16-3-29) specified, and direct such state auditor to issue his warrant upon the state treasurer payable to the county treasurer within such county in the state of New Mexico as may require additional funds; whereupon it shall become the duty of such auditor to issue his warrant upon the state treasurer payable to the county treasurer of such county, and such money so paid shall be covered into the court fund of such county, and be used only for the purpose of the trial of criminal cases in such county."**

(Again we add, parenthetically, that the duties of the State Auditor relative to drawing warrants on the State Court Fund have been transferred to the Director of the Division of Financial Control of the Department of Finance and Administration. See § 11-2-67, N.M.S.A., 1953 Compilation.)

Thus, the only condition precedent to the disbursement of the State Court Fund is a sufficient showing to the State Board of Finance that additional funds are needed in a particular county for the trial of criminal cases. There is no statutory requirement that the County Court Fund first be exhausted. We think that if a county can demonstrate through its budget and tax collections that a particular expense in a criminal case exceeds, or will cause to be exceeded, the amount of money in the County Court Fund

that has been budgeted for the trial of criminal cases, then the State Board of Finance would be authorized, though not required, to direct that funds of the State Court Fund be transferred to the County Court Fund to meet the excess expense. What amounts to a sufficient showing of need is solely a question for the State Board of Finance, and not a legal question. The State Board of Finance may set its own standards so long as they are reasonable and not arbitrary.

Of course, funds can only be transferred from the State Court Fund for a legal purpose, and use of the State Court Fund is limited to the expenses of the trial of criminal cases. See § 16-3-28, supra. Therefore, the question that this office has to answer is whether payment of an auditor's fee to audit books to obtain evidence in the preparation of a criminal case for trial is a use for the "trial of criminal cases".

Prior Opinions of this office are not helpful, for they dealt, without exception, with the County Court Fund, for which the legal uses are much broader than the State Court Fund. We believe that the reasoning of Attorney General's Opinion No. 1806, October 29, 1937, would permit payment of the fee in question from the County Court Fund, but now we must see if that same expense can be brought within the phrase "trial of criminal cases".

"Trial" is defined in § 21-8-1, N.M.S.A., 1953 Comp., as follows:

"A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact."

In **Board of County Commissioners of Quay County v. Wasson**, 37 N.M. 503, 24 P. 2d 1098 (1933), the Court approved this further definition of the word "trial":

"The judicial investigation and determination of the issues between parties; that part of the litigation which consists in the examination by the court of the determination of the controversy or final submission of the cause for determination."

In **New Mexico State Highway Department v. Bible**, 38 N.M. 372, 34 P. 2d 295 (1934), the Court said:

{\*649} "The word 'trial' ordinarily includes nothing beyond proceedings in the court in which the case originated, except where there is a trial de novo after appeal."

We are aware that the authorities cited relate to civil, not criminal, cases, but they are the only guidance we have in determining the meaning of the word "trial". In the terminology of the criminal courts, the word "trial" might have many meanings depending on the purpose for which the definition is employed.

In our opinion, when § 16-3-28, supra, employed the phrase "trial of criminal cases", the Legislature contemplated the submission of the issues to a court, the proceedings in court, the hearing of evidence, and the final determination of the cause. This does not,

in our opinion, include the preparatory or investigative phases of a criminal trial, such as audits, depositions, laboratory tests and the like, but it does include such expenses as witness fees and jury fees. To hold otherwise would open the State Court Fund to use for investigative acts that might never be used in a criminal trial. While we recognize that investigation and preparation are essential to any trial, we feel that the State Court Fund may not be disbursed to pay for them, but may only be disbursed for expenses directly attributable to the presentation of a criminal trial at a hearing in court.

By: Norman S. Thayer

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