

## Opinion No. 63-79

July 10, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** District Judge Caswell S. Neal Fifth Judicial District Carlsbad, New Mexico

### QUESTION

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Where a District Attorney or his assistants have incurred actual expenses while engaged in carrying out their duties in participating in condemnation actions brought by the Board of County Commissioners to condemn the right-of-way for portions of a new highway, should these expenses be paid out of the Court Fund or should these expenses be borne by the County of its funds?

#### CONCLUSION

Such expenses should be paid out of the Court Fund of the County seeking to acquire such highway right-of-way.

### OPINION

#### {\*168} ANALYSIS

The question presented involves consideration of several pertinent statutory provisions. Section 17-1-3, N.M.S.A., 1953 Compilation, pertains expressly to expense allowances of district attorneys or their assistants. Their statutory provision sets out in part as follows:

"District attorneys and other personnel -- Expense allowances -- Limitation on private practice. {\*169} -- A. The actual traveling expenses, by common carrier or personal automobile shall be paid for on the basis of transportation costs by common carrier and at the rate of nine cents (\$.09) per mile for travel by personally owned vehicle, and subsistence in lieu of actual expenses shall be paid to the district attorneys and other personnel at the rate of eight dollars (\$ 8.00) per diem, or actual expenses, **while in the discharge of their duties**, provided that per diem in lieu of subsistence shall not be allowed while such district attorneys and their assistants and other personnel are performing duties within a radius of twenty miles of their respective duty stations. **Such expenses incurred while in the discharge of their duties shall be paid out of the court fund of each county when supported by sworn statements of such expenses, and approved by order of the court.**" (Emphasis supplied).

In Attorney General's Opinion No. 62-134, dated October 24, 1962, it was previously held that District Courts possess a wide latitude of discretion in authorizing the disbursement of moneys from the Court Fund and that the Court may either authorize actual expenses or mileage and actual expenses or mileage and per diem to district attorneys or other personnel dependent upon the option of the Court.

Section 55-2-28, N.M.S.A., 1953 Compilation, prior to its amendment by Chapter 214, Laws 1963, declared that it was the duty of district attorneys to commence and prosecute actions to acquire rights-of way for highway purposes, upon request by the board of county commissioners or the state highway department. This section was expressly repealed by Chapter 249, Laws 1963. However, the new statutory provision relating to the acquisition of rights-of-way for highway purposes set out that the district attorney still has the duty to "prosecute an action to acquire" by condemnation rights-of-way necessary for highways upon request by the board of county commissioners or the state highway commission.

Section 16-3-22, N.M.S.A., 1953 Compilation, provides by statute for the levy of a tax for a county court fund, and the statute also regulates disbursements from the county court funds. This section sets out in part:

"Said tax shall be collected in the same manner as other taxes are collected and shall be known as the Court Fund; when collected it shall be turned over to the county treasurer, to be by him disbursed for the payment of the expenses of the district court in his county only as provided by law or upon a certificate of the clerk of the district court of the district in which his county is situate, that an allowance has been made by said court, and no court shall authorize the issuance of any certificate of any account whatsoever unless there shall be at the time money in the county treasury to meet and pay such certificate . . ."

Under a 1963 amendment to the laws regulating the county Court Funds, it is now provided that additional funds may be obtained from the State Court Fund for unanticipated expenses necessary for the trial of cases in counties of this state. Section 16-3-27, N.M.S.A., 1953 Compilation sets out that the district judges will on or before May 1 of each year {<sup>\*170</sup>} certify to the state tax commission the amount of money required in each county of his district for the trial of cases. A tax levy will then be made to raise district Court Funds, provided however, if the amount required is in excess of the maximum amount which may be levied by a tax levy in such county, then the state tax commission may levy astate Court Fund tax on a statewide basis and such moneys will be kept by the state treasurer in a separate fund designated as the "State Court Fund." The state board of Finance, under section 16-3-28, N.M.S.A., 1953 Compilation, may, if additional funds are needed in any county of the state to meet expenses for the trial of cases, certify to the department of finance and administration the amount needed by such county, and additional funds will be transferred to the Court Fund of the county where such funds are needed.

From our review of the above statutes and the manner by which the Court Funds are derived, it is our opinion that where district attorneys or their assistants incur expenses while discharging their official duties to assist counties in the acquisition of rights-of-way for highway purposes, such expenses upon the approval of the district judge, should be recompensable out of the Court Fund of the county for which such legal services were rendered.

By: Thomas A. Donnelly

Assistant Attorney General