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October 23, 2013

ATTORNEY GENERAL OPINION NO. 2013- 15

The Honorable Anthony Hensley
Senator, Nineteenth District
State Capitol, Room 318-E
Topeka, Kansas 66212

Re: Counties and County Officers—County Attorney—Duties; Qualifications;
Holding Other Office

Synopsis: An attorney is not prohibited by K.S.A. 19-705 from serving simultaneously as a county attorney for more than one county. Any prohibition requires an amendment to the statutory qualifications of a county attorney. Cited herein: K.S.A. 2013 Supp. 19-101a; 19-701; 19-702; 19-704; 19-705.

* * *

Dear Senator Hensley:

As Senator for the Nineteenth District, you ask whether a person who is elected as county attorney in one county may also hold office as the elected county attorney in another county within the State of Kansas and, if so, what actions may be taken to preclude such service. We begin our analysis with a review of the qualifications and duties of a county attorney.

The office of county attorney is created by K.S.A. 19-701 *et seq.* Regarding qualifications, a county attorney must be “admitted to practice within the state of Kansas, and is at the time of nomination and election a regularly qualified practicing attorney of this state.”¹ Neither the Constitution nor a statute requires as a qualification for the office of county attorney residence in the county at the time of filing, nomination, election, or holding office.²

¹ K.S.A. 19-701.

² Kansas Attorney General Opinions No. 95-93 and No. 76-187.

The duties of a county attorney are “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 and to provide “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.”⁴ In short, the office of county attorney is a county office.⁵

Your inquiry concerns the prohibition in K.S.A. 19-705 that no “county attorney while in office be eligible to or hold any judicial or other county office whatsoever.” Prior interpretations of this limitation by our office are useful in answering your question. Whether the limitation in K.S.A. 19-705 applied to holding a judicial office in another county was addressed in Attorney General Opinion No. 75-452 as follows:

[T]he better construction of this statute is to read together the offices which are stated disjunctively, ‘any judicial or other county office,’ and to construe the judicial offices to which the disqualification attaches to be those judicial offices located in the county in which the county attorney serves. Accordingly, construed in this manner, a county attorney is disqualified from holding, during his or her tenure as county attorney any judicial office within the county in which he or she serves, and is not disqualified by operation of this statute from serving as municipal judge in a city located outside the jurisdiction of the county which he [or she] serves as county attorney.

Subsequently, our office was asked to construe the prohibition in K.S.A. 19-705 to determine whether a county attorney in one county may also hold office as county attorney in another county within Kansas. Relying upon Attorney General Opinion No. 75-452, we concluded that:

[T]he prohibition against holding ‘any . . . other county office’ refers to another county office within the same county. Therefore a county attorney is not prohibited by K.S.A. 19-705 from serving as county attorney in another county. This conclusion is further supported by the lack of any residence requirement for county attorneys. We believe that a reason for not having a residence requirement is due to difficulty in finding qualified persons to serve as county attorney in certain counties.⁶

³ K.S.A. 19-702(a).

⁴ K.S.A. 19-704.

⁵ *Wall v. Harrison*, 201 Kan. 598, 604 (the offices of county attorney were created to assist the counties in carrying out their usual and necessary political functions, and the “county attorneys are elected by voters of their respective counties; they are paid from funds levied and collected by their counties; [and] their territorial jurisdiction is limited generally to their counties”).

⁶ Correspondence to Laurel D. McClellan, Kingman County Attorney, dated May 8, 2000.

Finally, in Attorney General Opinion No. 2003-4, we were asked whether a court could appoint a county or district attorney from a different judicial district as a special prosecutor when the county or district attorney in the local judicial district was disqualified from prosecuting a case. Answering in the affirmative, we quoted a Kansas case wherein the appellate court approved such reciprocal non-compensated arrangements:

There is no law that requires a county attorney to attend any court or do any business, civil or criminal, that requires his or her personal attendance outside his own county. However, there is also no law that prevents a county attorney from voluntarily appearing without compensation in another county to prosecute an action which arises in that county.⁷

We then addressed whether a county attorney could accept compensation for prosecuting a matter in another county and concluded as follows:

Insofar as whether an attorney from another county or district attorney's office can accept a fee for prosecuting a matter in another county, K.S.A. 19-705 prohibits a county or district attorney from accepting a fee for the performance of official duties required by law. Those official duties include prosecuting criminal matters in the court having jurisdiction in the county. Therefore, K.S.A. 19-705 would not preclude accepting a fee for prosecuting a case in another county on behalf of a disqualified [county or] district attorney's office.

K.S.A. 19-705 has not changed since the above opinions by this office. Additionally, our research found no other statute or case law to warrant a different conclusion.

In addressing what can be done to preclude an attorney from serving simultaneously as county attorney in two different counties, we again refer to a prior Attorney General Opinion:

Only the Kansas legislature has the authority to impose election restrictions or qualifications upon elected county officers. See K.S.A. 1994 Supp. 19-101a(7)⁸ (“[c]ounties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers.”) If a nonresident of the county runs for a county office, the electorate may decide if county residence is important and vote accordingly. Alternatively, the state legislature may change current law to require residency.⁹

⁷ Quoting *State v. Rollins*, 24 Kan. App. 2d 15, 23, *reversed on other grounds*, 264 Kan. 466 (1998).

⁸ Codified in K.S.A. 2013 Supp. 19-101a(6).

⁹ Attorney General Opinion No. 95-93.

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In conclusion, K.S.A. 19-705 does not prohibit an attorney from serving simultaneously as county attorney for more than one county. Any prohibition requires an amendment to the statutory qualifications of a county attorney.

Sincerely,

Derek Schmidt
Attorney General

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Assistant Attorney General

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