

November 6, 1992

Ms. Barbara J. Layher
Elmore County Prosecuting Attorney
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Mountain Home, ID 83647-0607

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Ms. Layher:

You have requested an opinion from this office regarding the payment of witness fees pursuant to Idaho Code § 19-3008. You have raised several questions in this regard. I will address each question in turn.

1. Does payment of witness fees from "District Court funds" violate any constitutional or statutory requirement for separation of powers? Further, are the Elmore County Commissioners obligated to comply with the Court's request to transfer or provide funds, historically provided under the Budget Line Item as district court funds, to another department or officer's budget?

The answer to this question is found by analyzing Idaho Code § 19-867 and the nature of the district court fund. Idaho Code § 31-867 provides for the creation of a district court fund:

(1) The board of county commissioners of each county in this state may levy annually upon all taxable property of its county, a special tax not to exceed four hundredths per cent (.04%) of market value for assessment purposes for the purpose of providing for the functions of the district court and the magistrate division of the district court within the county. All revenues collected from such special tax shall be paid into the "district court fund," which is hereby created, and the board may appropriate otherwise unappropriated moneys into the district court fund. Moneys in the district court fund shall be expended for all court expenditures other than courthouse construction or remodeling and for salaries of the deputies of the district court clerk, which salaries shall be expended from the current expense fund.

(2) Balances in the district court fund may be accumulated from year to year sufficient to operate the court functions on a cash basis, but

such balances shall not exceed sixty per cent (60%) of the total budget for court functions for the current year.

The fact that the district court fund provides for "the functions of the district court and the magistrate division of the district court," does not place the fund within the judicial branch of government. Similarly, because the funds are expended for judicial purposes does not exclude the expenditures from the constraints of title 31, Idaho Code, and, ultimately, the scrutiny of the board of county commissioners.

Previously, this office concluded that the district court fund came under the control of the board of county commissioners. In Attorney General Opinion No. 79-2, we stated:

Section 31-867, Idaho Code, does not expressly state that the county commissioners shall have the control of expenditures from the district court fund, nor does it vest such control in the district court. However, since the statute gives the county commissioners the power to set the tax levy for and to appropriate to the district court fund, it appears to be the legislative intent that the commissioners also control the expenditures from it. No other statutes have been located which contradict this view. Indeed, the County Budget Law, (Idaho Code, §§ 31-1601 through 31-1612) and other statutes governing county fiscal matters, as well as §§ 1-1613 and 1-2217, Idaho Code, which require counties to provide facilities and personnel for courts, lend support to the conclusion that the counties, and not the courts, have control of expenditures from the district court fund.

In relation to the authority of the district court over the fund, this office concluded:

Section 1-907, Idaho Code, does give the administrative judge in each judicial district certain administrative supervision and authority over the operation of the district courts and magistrates. These powers include, but are expressly not limited to, the functions enumerated in the statute, including supervision of the district courts in the discharge of the clerical functions of the district courts. However, nothing in the statute appears to grant the administrative judge any power to make expenditures from or to exercise direct control over the district court fund.

Stated from a different perspective, it would appear that §§ 31-867 and 1-907, Idaho Code, are inadequate bases for concluding that the courts' inherent power is now unlimited or specifically that the District Court Fund is to be administered by the court rather than the county commissioners.

It has long been recognized that if the board of county commissioners fails to provide the necessary resources for the existence and operation of the courts, courts do have the inherent power to "incur and order paid all such expenses as are necessary for the holding of court and the administration of the duties of courts of justice." Schmelzel v. Board of County Commissioners, 16 Idaho 32, 35, 100 P. 106 (1909). Nonetheless, it is the opinion of this office that, so long as the county conducts its financial affairs in a manner that reasonably provides for the proper function and administration of the courts, the board of county commissioners has direct control over the district court fund.

In regard to witness fees, Idaho Code § 19-3008 provides for the payment of witness fees in criminal proceedings. This section states in relevant part:

When a person shall attend before a grand jury, or the district court, as a witness, upon a subpoena, or pursuant to an undertaking, such person shall receive the same rate per mile as the state of Idaho pays for state employees pursuant to section 67-2008, Idaho Code, but no person can receive more than one (1) mileage under this section per day of attendance in court; such person shall also receive eight dollars (\$8.00) per day for each day's actual attendance as such witness and reasonable lodging expense when approved in advance by the judge before whom the witness appears. Such mileage and per diem must be paid out of the county treasury of the county where such district court is held, upon the certificate of the clerk of said court:

The witness fees granted pursuant to this section are paid from the "county treasury." The statute does not designate the account to be charged. However, through the county budgeting process, chap. 16, title 31, Idaho Code, the board of county commissioners has the responsibility of reviewing estimates of all proposed expenses for the upcoming fiscal year, including witness fees, and specifying the fund to be charged for the expenditures. Idaho Code §§ 31-1603 through 31-1605. Thus, in light of the absence of the specific fund to be charged, it is reasonable to conclude that the board of county commissioners has the authority to designate the fund to be charged for witness fee expenditures made pursuant to Idaho Code § 19-3008. Conversely, the courts have no statutory authority to direct the county commissioners in the county budgeting process to provide for and make expenditures from one particular fund.

Turning to the specific questions presented, since the district court fund is administered by the board of county commissioners and not the courts, this executive function does not implicate or intrude upon the judicial function of the courts. Therefore, in administering the district court fund, the board of county commissioners is merely following its statutory directive in providing a functional county court system within the county. Idaho Code §§ 1-1613 and 1-2217. This activity does not violate the separation

of powers doctrine. Art. 2, § 1, Idaho Constitution; State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971).

Similarly, since the board of county commissioners sets the district court fund levy and controls expenditures from the fund, the Elmore County Board of Commissioners is not obligated to comply with the district court's directive to transfer the witness fee expense from the district court fund to another fund. Beyond offering its advice on the subject, the courts possess no authority to administer the county budgeting process. This is an executive function left to the discretion of the board of county commissioners.

Finally, this conclusion is buttressed by the language found in Idaho Code § 31-867 that states the fund "shall be expended for all court expenditures other than courthouse construction or remodelling and for salaries of the deputies of the district court clerk," Arguably, the mandatory language used in Idaho Code § 31-867 requires that witness fees be paid from the district court fund.

2. Does Idaho Code § 19-3008 require mandatory payment of fees and mileage to law enforcement officers whether the officer is on duty or off? When off-duty, is the officer entitled to mileage from residence (assuming they are using a private vehicle) or, as has been adopted by the District Court, from the Law Enforcement Building where the subpoena is served upon the officer?

Idaho Code § 19-3008 makes no distinction between law enforcement witnesses and non-law enforcement witnesses. There appears to be no statutory basis to deny witness fees to law enforcement personnel—on duty or off duty. Of course, if the officer is on duty and being paid by a law enforcement agency, the agency would have the right to reduce his compensation accordingly so that the officer is not receiving additional compensation for performing duties of the job. If the officer is not on duty, there is no statutory basis to deny the fees and mileage to the law enforcement officer. Further, there is no legal authority for the district court to restrict the payment of mileage to one particular location.

Presumably, a law enforcement agency could, as a condition of employment, forbid law enforcement officers from accepting witness fees and mileage. The appearance in court by law enforcement personnel could be designated a job-related activity and compensated pursuant to the department's employment contract.

3. If Law Enforcement Officers are always entitled to payment of fees and mileage, is it permissible for the District Court to pay such funds directly to the law enforcement agency (for disbursement to the officer pursuant to the agency's policy), or must such payments be made to the individual officers?

Idaho Code § 19-3008 does not directly address this question. It does provide that witness fees shall be paid from the county treasury and that subpoenaed witnesses testifying at criminal proceedings have the statutory right to payment. If the law enforcement agency has no provision addressing witness fee and mileage payments within its personnel policy, the officer would have the right to the fees and mileage. Whether the law enforcement agency has the right to be paid directly for its officers' witness fees and mileage when on duty is not addressed in the statute and is a matter that should be resolved by the county, the law enforcement agency and its personnel.

If you have any further questions in this regard, please do not hesitate to contact me. I apologize for the delay in responding to your letter.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General