

Opinion No. 57-320

December 16, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Honorable James M. Scarborough, District Judge, First Judicial District, Division II, Santa Fe, New Mexico

QUESTION

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1. May a district judge allow an attorney a reasonable fee for services rendered the district judge when the latter is sued for acts committed in the capacity of district judge?
2. If so, may the allowance be out of the court fund?

CONCLUSION

1. See opinion.
2. Yes, subject to the holding of this office in Opinion of the Attorney General No. 57-307, dated November 26, 1957, if the judge is successfully defended.

OPINION

ANALYSIS

The factual background, briefly, is that you were respondent in two mandamus actions, brought before the Supreme Court of New Mexico. One suit was to compel you to hear a motion for a new trial in a criminal cause pending before you. The second suit was to compel you to disqualify yourself in all further proceedings in said criminal cause. In each case, you were represented by council. The first suit was successfully maintained against you; the second was not.

Much that was said in Opinion of the Attorney General No. 57-128, dated June 12, 1957, governs here. It was there pointed out that a district judge should be reimbursed out of the court fund for expenses (including attorneys fees) incurred in defending a civil suit brought against him for acts committed in his capacity as a judge, **if he is successful in defending himself**. Hence, no attorneys fees could be paid for services rendered in the first mandamus suit, unless you wish to do so from your personal funds.

In Opinion No. 57-128, the judge was sued in federal court, for damages. We do not believe however, that those facts call for a different ruling here, since there was present

in each of your cases litigation arising out of acts committed by you in your official judicial capacity. Such seemed to be the most important factor in Opinion No. 57-128, and which factor should in our opinion, control here, although perhaps it could be urged that the real party defendant was the defendant in the criminal cause. On the other hand it could be said that your case is even clearer, since your acts which instigated the two suits involved your duties to the State and its prosecuting officers, and not to a litigant.

We conclude your attorney is entitled to a fee for services rendered you, but only in the second mandamus suit, payable out of the court fund, conditioned as we held in Opinion of the Attorney General No. 57-307.