

Opinion No. 79-29

July 16, 1979

OPINION OF: Jeff Bingaman, Attorney General

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TO: Fred O'Cheskey, Chief Highway Administrator, State Highway Department, Post Office Box 1149, Santa Fe, New Mexico 87503

COUNTIES

State agencies using the office of County Sheriff for the service of process must pay the statutory fees.

QUESTIONS

1. Are state agencies required to pay fees for service of process by county sheriffs?
2. If so, may the sheriffs require fees to be paid in advance?

CONCLUSIONS

1. Yes.
2. Yes.

ANALYSIS

The authority of sheriffs to collect fees for the service of process is well-established by laws which define no exception for service of process on behalf of the state or any of its agencies.

Section 4-41-15 NMSA 1978 provides that:

"The party at whose application **any** civil writ, subpoena or process, except execution, is issued, shall pay in advance, if so demanded by the sheriff, the fees allowed by law for such services." (Emphasis supplied.)

Concomitantly, Section 4-41-16(A) provides that:

"The sheriffs of this state shall be allowed the following fees and compensations:

(1) for serving **every** writ, citation, order, subpoena or summons, six dollars (\$6.00)."
(Emphasis supplied.)

OPINION

The fees collected by sheriffs do not accrue to them personally but are deposited with the county treasurer. See Sections 4-44-21 NMSA 1978 and 4-44-28 NMSA 1978. As explained in **State ex rel. Peck v. Velarde**, 39 N.M. 179, 43 P.2d 377 (1935), with the adoption of the state constitution, Article X, Section 1 abolished the fee system as a means of compensating county officers and substituted a salary system. In Opinion of the Attorney General No. 6242, dated July 28, 1955, this office found that what is now codified as Section 4-44-28, **supra**, prohibits a county from charging less than the prescribed fees because to charge less or not to charge at all would "impair a source of county income."

Nevertheless, in Opinion of the Attorney General No. 57-207, dated August 22, 1957, this office concluded that sheriffs could not collect service of process fees from the counties or state. In reaching that conclusion, the opinion cited the following dicta from **State ex rel. Peck v. Velarde, supra**: "Apparently the sheriff cannot collect from the county service fees and {72} mileage for the service of process issued on behalf of the county or state." 39 N.M. at 182. However, the issue in **Peck, supra**, was not, as here, the collection of statutory fees but rather the reimbursement for actual expenses. See, **e.g.**, Section 4-41-19 NMSA 1978. The Court noted that:

"to require of officers the performance of duties requiring the expenditure of expense money in such performance out of the officer's own pocket without reimbursement would probably run afoul of the constitutional provision against enacting a law diminishing the compensation of officers during their term of office. . . . What the county pays to the sheriff he is not required to pay back to the county."

39 N.M. at 182. In short, given the particular context of **Peck, supra**, the dicta cited in Opinion No. 57-207 is not conclusive authority on this question.

The better authority holds that when the state or one of its agencies appears as a litigant, it assumes the status of a private individual and is subject to ordinary rules of civil procedure, **State ex rel. Highway Comm'n v. Taira**, 78 N.M. 276, 430 P.2d 773 (1967), and absent any statute to the contrary, it would appear that the state, as a litigant, is liable for the payment of service of process fees.

Accordingly, it is the present conclusion of this office that Opinion No. 57-207 is overruled in so far as it holds that the state and its agencies are not required to pay the statutory fees for service of process pursuant to Section 4-41-16(A), **supra**. The state and its agencies need not use the sheriff to serve process but if they do, they may also be required, pursuant to Section 4-41-15, **supra**, to pay in advance.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General