

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

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OFFICIAL OPINION NO. 67-68 pg. 476

**Countys. County Judge appointed attorney for indigent defendant in criminal action is entitled to keep and retain fees paid in pursuance to SDC 1960 Supp. 34.1901 (SDC 48.0608)**

You have requested an official opinion based upon the following situation:

" 'A' a County Judge, who by statute is authorized to engage in the private practice of law, is appointed by a competent Circuit Judge to act as an attorney for an indigent defendant accused of and prosecuted for the commission of a felony."

The question submitted in view of such factual situation is as follows:

"May such County Judge, on the assumption there is no incompatibility with his official duties and acting as such attorney, receive the statutory compensation provided by SDC 1960 SUPP. 34.1901, and retain the same, or do the provisions of SDC 48.0608 apply so that he must, upon receipt of such fees, deposit the same with the County Treasurer?"

SDC 48.0608 (it appears that this statute originated in Section 1 of Chapter 65 of the Session Laws of 1891) provides:

"No county or state officer for whose services a salary is provided by law shall receive any compensation for his services other than such salary. All fees received by him shall be paid into the county or state treasury, as the case may be, at the close of each calendar month, or not later than the fifth day of the succeeding month. This section shall not be so construed as to affect in any manner any officer who receives no salary other than the fees paid for his services."

More fundamental, however, than this statute which has existed since statehood, is Section 30 of Article V of our Constitution which provides that no Judge of County Court shall receive any compensation, perquisite, or emoluments for or on account of his office in any form, whatsoever, except such salary (and in addition he may receive any fees as may be allowed under the land laws of the United States.)

The constitutional provision herein cited was interpreted by our Supreme Court in **Burns v. Bd. of County Commissioners** (1917) 39 SD 426, 164 NW 1028, when our Court was directly faced with answering the question: "May a County Judge, in addition to his salary, receive and retain for his own use fees for services while acting as a member of the County Board of Insanity?" (The Court in such opinion also pointed out that Sec. 2 of Article XXI of the Constitution as it then existed (such language has been removed by amendment) provided that all state constitutional officers shall receive "no fees or perquisites whatever for the performance of any duties connected with their office.")

The Court pointed out that the provisions of Sec. 30, Article V, are broader than those contained in Sec. 2, Article XXI, for the reason that such Section 30, not only forbade any extra compensation, not only for the duties of the office, but also extra compensation by reason of the office itself. The Court concluded that because the County Judge was a member of such Board of Insanity, because of his office, under the Constitution, he could not retain any fees paid as a member of such Board.

In **State v. Roddie** (1900) 12 SD 433, 81 NW 980, and **State ex rel McMaster v. Reeves** (1921) 44 SD 612, 184 NW 1007 our Court held there was no Constitutional restraint upon the Legislature from creating new positions, imposing such new and distinct duties from such office upon a Constitutional officer, and providing additional compensation for the same. (These were decided under Section 2 of Article XXI of the Constitution, heretofore referred to.)

In his Concurring Opinion, in **Hoyt v. Hughes County** (1931) 32 SD 117, 142 NW 471, Judge Whiting, most properly pointed out that it was fundamental that:

"No person occupying an official position for which the Legislature has prescribed a salary is entitled to compensation other than such salary, for the doing of those things included within the duties for which the salary is allowed; where a fee is allowed for the doing of an act, the officer is entitled to no other compensation for the doing of that particular act or service; no officer can recover any service coming within his official duties, for which no fee or salary has been provided, unless the Legislature has vested in some person or body authority to pay for such services."

Our Supreme Court has determined that the **Roddie** and **Burns** case are consistent one with another. It is my opinion that the cited decisions are all consistent and merely provide that when the Legislature provides a fee, or other compensation may be paid for the performance of certain duties, if such duties are not connected with the official duties of a particular office, and the duties are not placed upon a particular public officer by reason of his office (insofar at least as a judicial officer within the purview of Sec. 30, Article V of our Constitution) there is nothing evil, unconstitutional, or illegal for such public officer to keep such compensation for such extra duties as he has performed.

My predecessors have held that the rationale of the **Roddie** opinion applies to county officials, and if the Legislature creates a new and distinct office and places a county

Constitutional officer in charge of such new office, that it is constitutionally proper for the Legislature to allow and award extra compensation for such extra services. See 1916-1917 AGR 522 and 1917-1918 AGR 419.

In principal, I believe my predecessor furnished the answer to your question in an opinion reported in 1905-1906 AGR 152-154, and affirmed in principle in 1913-1914 AGR 618 (on pages 622 and 623 thereof.)

In the 1905-1906 opinion, it was shown that Section 2806 of the Political Code of 1903, provided that the County Board of insanity consisted of the County Judge and two other members appointed by the County Commissioners. One of such members being a respectable practicing physician and the other a respectable practicing attorney. The statute also authorized certain fees and compensation for such board. The question was asked, if the State's Attorney is appointed a member of such Insanity Board, is it lawful for him to personally retain the fees for such services? My predecessor concluded that it was lawful for the State's Attorney to retain such fees. He stated it was apparent that the State's Attorney was not appointed to such Board, because of his official position, but his appointment is based upon being a "respectable practicing attorney." It was further found that the duties of such Insanity Board were not duties required to be performed as a part of his duties as State's Attorney, and the performance of such duties were not incompatible with the duties of State's Attorney (for in case of such incompatibility, the State's Attorney would be disqualified to so act). My predecessor concluded:

"It would appear to us that the duties which he performs are outside of the office (of State's Attorney), and he is therefore entitled to compensation as provided by the statute, the same as any practicing attorney would be who is appointed by the Board of County Commissioners."

In applying these court decisions and opinions to the question you have raised, it must be presumed that if there were any incompatibility between being County Judge and attorney for an indigent defendant in a criminal case, the Circuit Court itself would have refrained from such appointment. Likewise, it is apparent there is nothing within the normal duties of a County Judge requiring him to defend an indigent criminal. It also is patent that the appointment of counsel for such indigent was on the basis that "A" was an attorney at law, admitted to practice within the state and competent to be an effective counsel for the indigent, and not because "A" was the County Judge. Likewise, it is apparent that by virtue of SDC 1960 Supp. 34.1901 the Circuit Court was granted authority to require the county to pay for such services as an attorney from the public funds. Such authority was exercised. The County Judge, in such circumstance, may retain such attorney fees as awarded by the Court and paid by the county for himself..

It might be said that none of the above decisions of the Court or opinions of the Attorney General considered SDC 48.0608, or its previous statute. This may be true. However, it is my opinion that a consideration of the language of such statute, in light of the statements of our Court and this office, make it evident that such statute must be interpreted as

concerned with fees received by virtue of the public office concerned. Such statute provides nothing more than does the Constitution.

Such fees a public officer receives (in this case the County Judge) that the statute states must be deposited with the County Treasurer, are fees received by virtue of such public office, and do not contemplate fees received from public funds, in pursuance to statute for services performed, not by virtue of such public office but for the performance of duties, not incompatible with and outside of and in addition to such official duties. Such statute as so construed is consistent with the opinions of the courts of South Dakota, and does not prevent the County Judge from personally retaining fees awarded him for defending an indigent defendant under a court appointment to so act in such capacity. See Chapter 115, Session Laws of 1966 for a specific limitation and Chapter 144, Session Laws of 1968 for a limitation, subsequent to January 1, 1969.