

497.

ATTORNEY FOR THE STATE OF OHIO—ADMISSION TO
U. S. SUPREME COURT—CASE INVOLVING THE STATE
OF OHIO—FEE FOR ADMISSION PERSONAL RE-
SPONSIBILITY—NOT PAYABLE FROM STATE FUNDS.

SYLLABUS:

A fee paid by an attorney for the state on admission to the United States Supreme Court, when a case involving the state is up for hearing there, is a personal responsibility arising from the qualifying of an attorney at law to practice his profession; hence the charge should be paid by the attorney rather than by the state authority from public funds.

COLUMBUS, OHIO, April 20, 1937

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion which reads as follows:

"I have before me Voucher No. 96 of the Attorney General's Office payable against a special appropriation under Senate Bill No. 29.

I note therein an item of \$15.00 for admission to the United States Supreme Court which is not accompanied by a receipt.

Inasmuch as this office, to date, has been unable to find a precedent for a similar charge, I kindly ask an official opinion of your office as to the legality of the Auditor of State in drawing warrant to reimburse a charge of this nature.

I am attaching hereto the voucher above mentioned."

It is provided by Section 333, General Code, that the Attorney General shall be the chief law officer for the state and all its departments. Section 333 reads:

"The attorney-general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. The attorney-general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state may be directly or indi-

rectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime."

It is specifically provided by Section 497, General Code, in respect to the Public Utilities Commission, that the Attorney General shall be the legal adviser of the Commission, with power to designate one or more of his assistants, to perform the services and discharge the duties of attorney to the Commission.

The law further provides, Section 336, General Code, that if, in his opinion, the interests of the state require it, the Attorney General may appoint special counsel to represent the state in civil actions or other proceedings in which the state is a party or directly interested.

In an opinion of the Attorney General, Opinions of Attorney General, 1927, Vol. II, page 1375, Opinion No. 785, it was held that special counsel appointed by the Attorney General to represent the Public Utilities Commission *is an employe of the Attorney General*.

On January 11, 1937, there was pending in the Supreme Court of the United States the case of *The Ohio Bell Telephone Company, plaintiff-in-error, vs. The Public Utilities Commission of Ohio, defendant-in-error*, consolidated cause No. 25065. That case is still pending in the Supreme Court of the United States and involves the right of telephone subscribers within the State of Ohio to a refund in the sum of approximately \$18,000,000. The case covers a period of more than twelve years, during which period the Attorney General's Office has undergone four separate administrations.

In my opinion, the interests of the state require that there be no change in the personnel of special counsel, in said litigation or proceedings, representing the Office of the Attorney General and the Public Utilities Commission.

It is specifically provided by Section 336, General Code, that special counsel shall be paid for their services from funds "appropriated by the general assembly for that purpose."

Pursuant to the foregoing authority, the 92nd General Assembly, regular session, through the enactment of Senate Bill No. 29, appropriated to the Office of the Attorney General the sum of \$10,000.00, "For the purpose of enabling the Attorney General to present to the Supreme Court of the United States of America * * * and for the purpose of enabling the Attorney General to employ special counsel and auditors for the presentation of the case of:

The Ohio Bell Telephone Company, plaintiff-in-error, vs. The Public Utilities Commission of Ohio, defendant-in-error, consolidated cause No. 25065".

As heretofore indicated, all assistant attorneys general and all special counsel are employes, agents, and representatives of the Attorney General and directly represent the Attorney General in all litigation and proceedings wherein the state or any of its various departments may be interested.

It requires no citation of authority upon the question of the scope of an agent's power; it can rise no higher than that of the principal.

In appearing before the Supreme Court of the United States, the special counsel or the assistant attorney general appears for and in the name of his principal, the Attorney General, and possesses only the power and authority that the Attorney General may have to appear before the United States Supreme Court.

It is again emphasized that Senate Bill No. 29 was enacted for "The purpose of enabling the Attorney General to present to the Supreme Court of the United States" the case referred to, and for the purpose of "enabling the Attorney General to employ special counsel * * * for the presentation of the case."

It was for the present purpose of investing designated and special counsel with the power legally and properly to represent the Attorney General and the Public Utilities Commission of the State of Ohio, in the present pending litigation and proceedings in the United States Supreme Court, that the present Attorney General of Ohio, made application for admission to practice law before said tribunal.

The principle of "a definite presently contemplated undertaking" is set forth with clearness and accuracy by this office in an opinion appearing in Opinions of the Attorney General for 1930, Vol. II, pages 1091-1094. In that opinion it was held that reimbursement of a municipal official for expenses incurred "in acquiring of general ideas pertaining to the duties of his position is unauthorized." The Attorney General then referred to the Annual Report of the Attorney General for 1912 to point out the distinction as to definite present objectives:

"The statement of your question with reference to the other officials, however, calls for a distinction. For as regards the necessary visits to other localities for the immediate purpose of acquiring information with reference to a *definite presently contemplated undertaking*, such as the purchase of machinery, the decisions permit of a modified applica-

tion of the above rules, holding that such visit may be regarded as of sufficient necessity to the performance of a fixed duty to justify an allowance of the cost so incurred as an expense incurred for the *benefit of the municipality in the performance of a duty enjoined by law.*'”

Again, in 1929, one of my predecessors in office in an opinion rendered to the Auditor of State, Opinions of Attorney General for 1929, Vol. III, page 1759, held that judges of the courts of appeals, attending an annual meeting for the purpose of electing a Chief Justice, are entitled to compensation for expenses so incurred, and said:

“It is stated in 23 American and English Encyclopedia of Law, 2nd Edition, Vol. 23, page 449:

‘Where the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him’

Throop on Public Offices, Section 495, states:

‘A public officer is entitled to receive from the public authority which he represents reimbursement for extraordinary expenses necessarily incurred by him, in the course of or in consequence of the discharge of his official duties, and not intended to be covered by the compensation allowed to him, the rule in this respect being the same as in cases of private agencies.’”

From the foregoing, it is clear that there is support of the expenses incurred by a public official for “a definite presently contemplated undertaking,” and earlier opinions of the Attorney General have so held. At the same time, the broad principles of law governing the custody of public funds and the authority for expenditures are so well established that they need little discussion here. Public funds can be disbursed only by clear authority of law *State ex rel. Bentley vs. Maharry*, 97 O.S. 272. There must be compliance with statutory provisions. *Batavia Board of Education vs. Clermont County Board of Education*, 19 O. App. 18. In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power. *State, ex rel. Bentley, vs. Maharry, supra.*

In the present instance there arises a new point of law. An attorney representing the State of Ohio was to appear before the United States Supreme Court, but he had not been admitted to

practice in that court. The question at issue is: Would the attorney personally pay a charge of \$15.00 for such admission or would that charge be paid by the state, together with other expenses incurred in his trip to Washington?

It has been seen that the Attorney General in earlier opinions held that an expenditure made by a public official for "a definite presently contemplated undertaking" justified a charge to be paid from public funds. It has also been recognized as law that "a public officer is entitled to receive from the public authority which he represents reimbursement for extraordinary expenses necessarily incurred by him." You state in your letter that in regard to the presently considered expenditure your office has been unable to find a precedent for a similar charge. The question, therefore, is one which presents new aspects which I shall analyze in relation to the trend of law in the earlier opinions which have been cited.

It may be pertinent and helpful to examine the status of attorneys at law. The term "attorney" by itself does not indicate one engaged in practicing the legal profession, although that meaning is popularly implied. In fact, the term may mean a person acting for another in almost any circumstances.

An attorney at law is a person licensed by the competent authority of his state to act as the agent of another in legal affairs. In Ohio such an attorney is licensed by the State Supreme Court. He is empowered to practice his profession not as a right but as a privilege. As conditions precedent to the granting of the privilege, he is required to show that he possesses definite qualifications as to both education and character. At the time of his admission, he is also required to take an oath that he will faithfully fulfill his duties, and thereupon he becomes an officer of the court in whose jurisdiction he is to practice.

In Ohio, the admission of attorneys at law is exclusively a judicial power, entrusted to the Supreme Court and free from any participation by the legislative and executive branches of the government. After admission, an attorney has an absolute right to practice in any court in the state which can be taken from him only by formal hearing of charges sustained by testimony of misconduct.

Admission to the federal courts is not governed by federal statutes, but by rules adopted by those courts in keeping with their power arising from the Constitution. A lawyer admitted to practice in his own state, therefore, is not automatically admitted to practice in the federal courts; for the two judicial systems, in such details, are independent. A lawyer in good standing, however, is customarily admitted to federal practice simply on motion to the court by a fellow practitioner. Thus admission to the United

States Supreme Court is granted upon such a motion, with the proviso that the applicant has practiced in his own state for three years and is of good character.

It will be observed, therefore, that before a man may become a lawyer he must prove that he has the required qualifications. A license is pre-requisite. It is the concern of the lawyer to establish his qualifications and to effect his admission to practice. If he desires to hold himself out as an attorney at law, he must take those steps prescribed. If he is legally to represent a client in any court, it is essential that he assure for himself proper standing in that court. Without such standing, he simply is not a lawyer qualified to act in legal affairs for another, either in the state courts or in the United States Supreme Court.

Consequently, on a careful study of the law, and particularly from the abstract reasoning which arises out of your inquiry, I have reached the conclusion that there is a distinction between the cases presented by former opinions of the Attorney General and present instance concerning a charge to the state for an attorney representing the state in the United States Supreme Court. My own legal analysis leads me to think that admission to the bar of that court is a personal incident of such a lawyer's professional qualification. In other words, a member of the legal profession, in order to accept the representation of clients, should be qualified to practice before any court in which he is required to appear. The concern is his; not the client's. It is inherent in his status as an attorney at law. Otherwise, he is not qualified to act as an agent in legal affairs.

As a result of this point of view, it is my opinion that any charge to be made for admission to the United States Supreme Court by an attorney to act for the State of Ohio should be paid by the attorney personally. In effect, I am now ruling against any charges presented by a member of my own staff in the office of the Attorney General. I think, moreover, that while every valid expense should be paid, all public officials should carefully adhere to what appears to be well founded principles of law. I therefore feel that it is my duty as Attorney General to rule against what might be my personal interests as a private individual.

It is also my point of view that whenever there is a doubt as to the propriety of a charge of expense, that doubt should be resolved by public officials in favor of the state and in protection of the public funds. While I shall uphold every expenditure which appears to be legitimately chargeable as an expense incurred in public service, I shall just as vigorously oppose such charges when

they appear to be the personal responsibility even of members of my own staff.

In specific answer to your inquiry as to the charging of \$15.00 by legal counsel for the state, arising from admission to practice before the United States Supreme Court, I am of the opinion that such a charge should not be paid from state funds but rather is a personal responsibility of such legal counsel in completing their full qualification to practice their profession in any court. I therefore hold that the present charge about which you inquire should by you, as Auditor of the State, be disallowed.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

498.

APPROVAL, GRANT OF EASEMENT EXECUTED TO THE STATE OF OHIO BY PROPERTY OWNERS IN ATHENS, FRANKLIN AND ALLEN COUNTIES FOR USE AS PUBLIC FISHING GROUNDS.

COLUMBUS, OHIO, April 21, 1937.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval certain grants of easement executed to the State of Ohio by several property owners in Athens, Franklin and Allen Counties, Ohio, conveying to the State of Ohio, for the purposes therein stated, certain tracts of land in said counties.

The grants of easement here in question, designated with respect to the number of the instrument, the location by township and county, and the name of the grantor, are as follows :

Number	Location	Name
644	Ames Township, Athens Co.....	Nellie and James Earich
660	Sharon Township, Franklin Co....	Methodist Children's Home Association
700	Sharon Township, Franklin Co....	Arthur L. Evans
701	Richland Township, Allen Co.....	Frank G. Kahle
702	Alexander Township, Athens Co.,	Paul F. Armstrong
684	Alexander Township, Athens Co.,	Mrs. Jacob Feth