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SYLLABUS:

An employee of a prosecuting attorney cannot be compensated by the payment of notary fees, not taxed as court costs, for notarial services rendered in the regular course of employment.

Columbus, Ohio, April 4, 1963

Hon. John T. Corrigan
Prosecuting Attorney
Cuyahoga County
Cleveland, Ohio

Dear Sir:

Your request for my opinion in material part as follows:

“Recently our Clerk of Courts announced that after February 28, 1963, he would no longer tax or pay notary fee in connection with Common Pleas and Court of Appeals case filings. Heretofore, the Clerk of Courts has historically taxed as costs notary fees in the sum of eighty cents and when collected he would pay the fees to the notaries.

“My office is required to file and defend many actions wherein pleadings must be verified and notarized. By way of example, we file many foreclosure actions on delinquent real property taxes, actions to collect delinquent personal property taxes, answers in a variety of suits brought against the county wherein the County Commissioners, County Auditor, County Treasurer, County Recorder and other county officials and boards are parties defendant. To put these pleadings into final form for filing in the courts, it is necessary for me to have one of my employees, a duly commissioned notary public, perform the notarial services thereon.

“Heretofore, there has been no question as to the compensation of the said employee-notary public because he could look to the clerk of Courts for the payment of his fees. Now, however, the fees will no longer be payable in that manner. The following questions, therefore, arise upon which your opinion is respectfully requested:

“1. May the employee-notary public be paid for his notarial services out of public funds?”

“2. If the answer to question No. 1 is in the affirmative, may he be paid by me out of the funds provided for this office in Section 325.12 of the Revised Code?”

Ordinarily, the amount and items taxable as costs are fixed by statutory provision (14 Ohio Jurisprudence 2d, 28, Section 33); however, as to items not specifically fixed as allowable costs by statute, the court may award and tax costs (14 Ohio Jurisprudence 2d, 7, Section 4).

Section 147.08, Revised Code, provides for the fees which may be charged by a notary public; but makes no provision for the taxing as costs of a fee for verifying a pleading in a court of common pleas or court of appeals. Nor am I able to find such provision in any other section of law. It thus appears that in the absence of the court itself directly taxing such fees as costs, the clerk of courts in the instant case may properly refuse to tax as costs the notary fees in question.

As stated in your request, notarial services are on frequent occasion necessary to the proper functioning of the office of prosecuting attorney. While your request is not explicit in this particular, I assume therefrom the notarial services are not independent of regular employment and I further assume from the manner in which the situation giving rise to the question developed there are no special agreements with employee-notaries public for the payment of notary fees.

The question then is may fees for notarial services be paid to employee-notaries public rendering notarial services as a part of their regular employment.

Section 309.06, Revised Code, provides:

“On or before the first Monday in January of each year, the judge of the court of common pleas, or, if there is more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year for the compensation of assistants, clerks, and stenographers of the prosecuting attorney’s office.

“The prosecuting attorney may appoint such assistants, clerks, and stenographers as are necessary for the proper performance of the duties of his office and fix their compensations, not to exceed, in the aggregate, the amount fixed by the judges of such court. Such compensation, after being so fixed, shall be paid to such assistants, clerks, and stenographers monthly, from the general fund of the county treasury, upon the warrant of the county auditor.”

While this section does not specify the basis upon which the prosecuting attorney shall fix the compensation of his employees within the aggregate sum fixed by the judge or judges of the court of common pleas, it would seem to contemplate compensation determinable from length of service as distinguished from remuneration, in whole or part, on a system of fees for services rendered. The word “fix” is defined as “to implant firmly”; “to give a final or permanent form” in Webster’s Third New International Dictionary. To fix compensation (as distinguished from fixing the manner of compensation) would seem to imply in the context in which it is used in Section 309.06, Revised Code, the establishment of a rate of pay which can be projected on an annual basis. Fees for notarial services are not estimable, prac-

tically, on an annual basis and cannot in my opinion be paid as compensation under Section 309.06, *supra*.

Aside from statute the general rule with regard to payment of fees for notarial services in the regular course of employment is stated in 39 American Jurisprudence, 217, as follows:

“Where a notary is employed by another in a private capacity which requires the whole of his time, and during the course of his employment, he takes affidavits and acknowledgments at his employer’s request, without any agreement as to the payment of his statutory fees, and he regularly receives and acknowledges payment of his regular salary, it seems that presumptively he is not entitled, after the termination of his employment, to recover his notarial fees, and that if the services are not independent of his regular employment, no right to fees accrues. * * *”

If, however, it is necessary to go outside the office of the prosecuting attorney for notarial services (a situation which admittedly is unlikely), I am of the opinion that the fees for such services may be paid from funds allocated for current expenses or, if not otherwise provided for, from funds provided for in Section 325.12, Revised Code, which reads:

“There shall be allowed annually to the prosecuting attorney, in addition to his salary and to the allowance provided for by section 309.06 of the Revised Code, an amount equal to one half of the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of

In answer to your question I am of the opinion that an employee of a prosecuting attorney cannot be compensated by the payment of notary fees, not taxed as court costs, for notarial services rendered in the regular course of employment.

Respectfully,
WILLIAM B. SAXBE
Attorney General