

SHERIFFS:

Sheriffs may personally claim per diem attendance for two courts on the same day providing he can execute the requests or duties imposed upon him by each court.

July 1, 1946



Honorable Ralph B. Nevins
Prosecuting Attorney
Hermitage, Missouri

Dear Mr. Nevins:

We received your opinion request and a letter of explanation, from which we quote your question:

"May a Sheriff collect per diem for attendance upon Circuit Court and Probate Court on the same day when the courts are held on different floors of the same building, and at the same time?"

As we understand your question, there are at least two factual circumstances that may arise under it. The first one could be, where the sheriff attended both courts on the same day and executed the duties as required. Examining the quotation from Corpus Juris, infra, we see that it is not absolutely necessary that a sheriff be in constant attendance upon the court. The second possibility your question presents, is where the sheriff's services are in such demand by one court as to preclude his attendance upon the other court.

In considering these two possibilities, we will begin with the second one, for it is the most easily disposed of. Under three previous opinions of this office, we have ruled that the attendance by a sheriff or deputy must be actual attendance, that is, real physical presence in order for the sheriff or deputy to collect the per diem fee. In the second possibility outlined above, if the sheriff's duties in one court are so strenuous and demanding that in order to execute them, he would be denied the opportunity to perform any duty placed upon him by the second court, it is obvious that the sheriff personally could have no claim against the second for per diem. Section 13411, R. S. Mo. 1939, provides for such a contingency by allowing the sheriff to appoint a deputy, and from the terminology of the statute, we believe it possible to infer that actual attendance is required. The pertinent

parts of said section are as follows:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day \$3.00"

If the second situation outlined above is the situation about which you ask, we believe that a sheriff cannot personally put in a claim for attendance on both courts, where he is unable to attend to and execute the duties imposed upon him by one court due to the demands of another court. In Corpus Juris, Vol. 57, Section 1177, the attendance at court in general is discussed as follows:

"A sheriff, deputy sheriff, or constable is entitled, as a matter of right, to compensation for attending court when, and only when, compensation is provided by statute. It has been held, however, that where the statute imposes upon the sheriff the duty of attending court if required by the judge, but provides no fees for such attendance, it is within the power of the board of county auditors to allow reasonable compensation therefor. Where a fee is provided only for attending certain courts, the sheriff cannot claim such fee for attending other courts; in order to entitle a sheriff to compensation for attendance at court, his attendance must have been required; a constable is entitled to fees for attendance on the sitting of a court only when the court was actually sitting; and, under a statute allowing constables a fee for attending each trial in a criminal case, a constable is not entitled to such fee where there was a plea of guilty, and judgment thereon, and no evidence was introduced.

"A sheriff is not entitled to fees for a mere nominal, colorable, or constructive attendance at court; but he is entitled to a fee for attendance, although he may have been absent from the court room several times during the hearing of a case, where it appears that he was within calling distance all the time ready to respond to any request, direction, or order

made to or upon him by the court or counsel; and a constable who was summoned, actually attended court, and was ready to perform his duties as a constable if called on, is entitled to his fees, although he did not actually perform any of the duties of a constable."

Several situations are ruled upon there, but we would like to point out especially the underlined portion of the above quotation. Regarding double compensation, Section 1178 provides as follows:

"Where the fee bill authorizes the sheriff to charge a certain amount for one day's attendance upon the court, he cannot charge an additional sum for attendance at a night session; where the statute allows the sheriff a certain per diem for attendance by himself or deputy, he cannot recover pay for two deputies attending the court; it is not proper for both the sheriff and his deputy to claim per diem or other compensation for attendance on the same court, at least where the attendance of one officer only is required; and a constable cannot recover the salary of a sergeant at arms for attending the sessions of a court where the salary has been received by a regularly appointed sergeant at arms; but where there are two judges holding court at the same time in the county, and it is the duty of the sheriff to attend upon each, he is entitled to an allowance for attendance before each judge; and where a statute gives the sheriff a per diem for attendance on a circuit or municipal court, and the same statute also contains a provision allowing him a certain amount per day for attending any court or officer with a prisoner, a sheriff is not precluded from recovering the fee for attending a municipal court with a prisoner by the fact that he has charged and received his per diem for attending on the same court on the same days."

The underlined portion of Section 1178 quoted, supra, seems to indicate that the sheriff would be entitled to claim an allowance for attendance before each court where it is the duty of the sheriff to attend upon each, even though they are in session at the same time. However, the case of LaSalle County

v. Milligan, 143 Illinois 321, 32 N. E. 196, which is cited as authority for the underlined portion of Section 1178, supra, actually holds that a sheriff may make a claim upon both courts, where two are in session at the same time and it is his duty to attend upon both, but that his making of a claim by way of a deputy is not a personal claim but a claim of the office of the sheriff.

In regard to the first possibility referred to above, where a sheriff attended both courts on the same day and executed the duties as required, we believe such a course of conduct is possible, and under such course of conduct it would be possible for the sheriff to make a personal claim against each court for an allowance, but please keep in mind that such a situation is factual. For example, under your question, if the circuit court was in session on the second floor and the probate court was in session on the first floor and the duties demanded by the circuit court did not conflict with, or preclude the execution of the duties of the other court thereby not requiring the constant physical presence of the sheriff in each court at the same time, the sheriff could attend upon both courts in such a manner as to be entitled to the allowance by both courts. Under our quotation of Section 1177, supra, it is seen that a sheriff is entitled to a fee for attendance although he may have been absent from the court room several times during the hearing of a case, but it appeared that he was within calling distance at all times and was ready to respond to any request, direction or order made to, or upon him by the court or counsel. Undoubtedly the better rule would be to require the actual physical presence of either the sheriff or a deputy in each court at the same time, and allow the sheriff to claim personally upon the court he actually attends, and the office of the sheriff to claim through the deputy for the court the deputy attends, as under the Milligan case referred to, supra. The discussion of the first possibility referred to above is considered because we could find no direct prohibition against such a situation.

Further, we direct your attention to Section 2034, R. S. Mo. 1939, which made it the duty of the sheriff to attend courts under the general law. Subsequently, however, said section was amended to read as follows:

"The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be

the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

This amendment of said section relieves the sheriff of the duty to attend court unless specifically directed by the court to so attend. With this in mind there could be no claim for per diem unless the court had directed the sheriff to attend upon said court, or unless under the general law it was the duty of the sheriff to attend upon said court.

CONCLUSION

Therefore, it is our conclusion that a sheriff may personally claim an allowance for attendance upon two courts which are in session at the same time, providing he can execute the duties, requests or orders imposed upon him by said courts with no derogation of each to the other. In the event that the duties imposed upon the sheriff by one court are such as to preclude him from attending a second court at the same time, the statute contemplates such a situation and provides for the appointment of a deputy, said deputy then claims an allowance for the office of the sheriff, but the sheriff is not personally entitled to claim. However, before any per diem may be claimed by the sheriff or his office, the attendance upon court must be directed by the court or imposed upon the sheriff by the general law.

Respectfully submitted,

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APPROVED:

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