

October 26, 1970

Answered by Letter - Klaffenbach
OPINION LETTER NO. 522

Honorable William G. Johnson
Prosecuting Attorney
Morgan County Court House
103 South Monroe
Versailles, Missouri 65084



Dear Mr. Johnson:

This letter is in response to your opinion request in which you ask:

"Upon occasion the Morgan County Judge of Probate and ex officio Magistrate is called into adjoining counties pursuant to Rule 23.05, Rules of the Supreme Court of Missouri.

"Will you kindly advise the appropriate method for such officer to obtain reimbursement and travel expenses and such other allowances as may be due him in connection with such performance of official duties in adjoining counties?"

Supreme Court Rule 23.05 states:

"If the magistrate is disqualified as provided in Rule 23.04, or if the magistrate disqualifies himself, he shall set the examination down for hearing on some date within ten days after the affidavit

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is filed, and shall notify and request some other magistrate in the county (but not a judge of a court having original jurisdiction to try felonies), if there be one, or if not some magistrate in an adjoining county, to conduct the examination in the court where the complaint is pending; and it shall be the duty of the magistrate so requested to appear at the time and place appointed for said examination, and he shall proceed with the same in like manner as if the complaint had originally been brought before him."

Section 544.300, RSMo 1969 which is similar in context to Supreme Court Rule 23.05 and additionally provides for reimbursement of certain expenses of the magistrate temporarily transferred, states:

"If the magistrate is disqualified as provided in section 544.290, he shall set the examination down for hearing on some date within ten days after the affidavit is filed, and shall notify and request some other magistrate in the county, if there be one, or if not, some magistrate in an adjoining county, to conduct the examination at the office of the magistrate where the complaint is filed; and it shall be the duty of the magistrate so requested to appear at the time and place appointed for said examination, and he shall proceed with the same in like manner as if the complaint had originally been brought before him' provided however, that no judge of the circuit court nor any of the appellate courts of this state shall be requested to conduct such examination. When a magistrate appears and conducts an examination as herein provided, his actual traveling expenses at a rate not to exceed five cents per mile and his actual subsistence expense at a rate not to exceed five dollars per day shall be allowed him and shall be taxed as costs in the case and shall be paid as other costs incurred on behalf of the state."

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Therefore, it is clear that Section 544.300 applies directly to the situation that you have in question.

We note that in the present situation, the transfer is not made by the Supreme Court. Probate and ex officio magistrate judges temporarily transferred or assigned by the Supreme Court receive their expenses pursuant to and as provided in Section 481.190, RSMo 1969 which provides:

"Any probate judge and ex officio magistrate when temporarily transferred or assigned by the supreme court to serve as a judge of a probate court and magistrate of a county other than the one to which he is appointed or elected shall be reimbursed for his expenses in the amount of five cents a mile for each mile traveled in going from the place of his residence to and returning from the place where such probate or magistrate court is held and for his subsistence in the amount of ten dollars per day for each day so engaged. Such expenses shall be paid monthly by the state from the magistrate fund upon the certification of the probate judge or magistrate so transferred or assigned."

Therefore a judge transferred under the provisions of Supreme Court Rule 23.05 is allowed such expenses which shall be taxed as costs in the case and paid as other costs, whereas a probate and ex officio magistrate judge temporarily transferred or assigned by the Supreme Court receives such expenses by the state from the magistrate fund upon the certification of such judge.

With respect to the mileage provisions contained in both Sections 544.300 and 481.190, we call your attention to Section 33.095, RSMo 1969, which was recently enacted by the Seventy-fifth General Assembly. Section 33.095 states:

"Other provisions of law notwithstanding, in every instance where an officer or employee of the state or any county, except first class counties with a charter form of government, is paid a mileage allowance or reimbursement, the allowance or reimbursement shall be computed at the rate of ten cents per mile unless a higher rate is specifically authorized by statute or order of the comptroller."

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It is our view that Section 33.095 expressly supercedes the mileage provisions of Sections 544.300 and 481.190 and as a result thereof such magistrate is authorized a mileage allowance computed at the rate of ten cents per mile. Therefore, the mileage to be taxed under Section 544.300 is to be at the rate of ten cents per mile and the mileage to be paid out of the magistrate fund under Section 481.190 is also to be at the rate of ten cents per mile.

Obviously, both of the latter sections differ with respect to subsistence in that Section 544.300 authorizes actual subsistence expenses at a rate not to exceed five dollars to be taxed in the case and, Section 481.190 authorizes a flat subsistence rate of ten dollars per day.

Additionally, with respect to the mileage provisions that we have noted, we wish to point out that when, as in Section 544.300 such officer is allowed to tax such mileage as an item of reimbursable expense to him, the situation is quite different from that upon which we passed in our Opinion No. 449, dated October 16, 1969, to the Honorable John C. Vaughn, Director, Division of Budget and Comptroller, copy enclosed, in which we distinguished a sheriff's taxation of mileage which was not to be retained by him personally, but was required to be paid into the county treasury and, held that Sections 33.095 did not apply in such a situation.

Very truly yours,

JOHN C. DANFORTH
Attorney General