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FILE NO. S-745

COUNTIES:
Compensation for
Special State's Attorneys

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Room 200 - Court House
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Dear Mr. Comba:

I have your letter in which you state:

"Recently in my county the Circuit Court appointed a private attorney under the provisions of Chapter 14, Section 6, Illinois Revised Statutes, 1971, to handle a matter in which my assistant had an indirect interest. His services included consultation with a complaining witness, and the handling of a subsequent presentation to the Grand Jury, which returned a No Bill. The attorney then presented a bill for his services to the Judge which had appointed him, setting forth the number of hours that he had

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spent in handling the entire matter, together with an amount for office expenses; the bill was based upon the hourly rate set forth in the Bar Schedule. Several questions have arisen as a result of this situation, and I would appreciate if you could answer them for me.

The aforementioned statute provides that 'such attorney so appointed . . . shall be paid by the county he serves the same compensation as provided by law for the State's Attorney of the county, apportioned as to the time of service.'

Firstly, I would appreciate your opinion as to whether such compensation should be set by the court which appointed said attorney, or should it be presented to the appropriate committee of the County Board, to be audited and either allowed or disallowed by them? Secondly, a review of all of the reported cases and Attorney General's opinions which have been published on the subject of compensation in such cases discloses that no exact formula has ever been advanced for the determination of how to precisely fix the compensation of the attorney involved. This leaves the question open as to how either the court or the County Board determines what is 'the same compensation as provided by law for the State's Attorney.' For example, what approach would be to divide the annual salary of the State's Attorney by fifty-two to determine the weekly salary, and then somehow reduce that to an hourly figure, which would be his hourly compensation? Would this be the proper figure to apply to the number of hours spent by the special attorney, or should the hourly or weekly salary paid to the State's Attorney include a figure which would allow for such added considerations as office space, secretarial help, supplies,

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library, investigative assistance, etc.? Also, would such a special attorney be entitled to expenses in addition to his compensation, or not?

I would appreciate receiving an opinion from you at an early date which would resolve the foregoing questions, as this is a matter of concern to the County Board, myself, and the attorney involved."

Section 6 of "An Act in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1973, ch. 14, par. 6) provides:

"Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general or state's attorney would have had if present and attending to the same, and in case of a vacancy of more than one year occurring in any county in the office of state's attorney, by death, resignation or otherwise, and it becomes necessary for the transaction of the public business, that some competent attorney act as state's attorney in and for such county during the period between the time of the occurrence of such vacancy and the election and qualification of a state's attorney, as provided by law, the

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respective county board shall, upon the written request of a majority of the circuit judges of the circuit in which is located the county where such vacancy exists, appoint some competent attorney to perform and discharge all the duties of a state's attorney in the said county, such appointment and all authority thereunder to cease upon the election and qualification of a state's attorney, as provided by law. Such attorney so appointed shall possess all the powers and discharge all the duties of a regularly elected state's attorney under the laws of the State, and shall be paid by the county he serves the same compensation as provided by law for the state's attorney of the county, apportioned as to the time of service."

The answers to your questions can be found in the recent appellate court case of People ex rel. Barrett v. Board of Commissioners of Cook County, 11 Ill. App. 3d 666. Said case arose out of the appointment of a special state's attorney to prosecute a mandamus action against the county board of Cook County on behalf of the county clerk who was contending that his salary had been unconstitutionally reduced during his term of office.

The statute under which the special state's attorney was appointed was the same as that quoted above. The grounds for appointing the special state's attorney were that the state's

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attorney was interested in the proceeding since he was officially committed to represent the county board and had issued a legal opinion that the salary reduction was correct as a matter of law.

The answer to your first question, concerning who should set the special state's attorney's compensation, can be found in the appellate court's determination on the county board's contention that the trial court lacked jurisdiction to entertain the special state's attorney's petition for fees and expenses. The county board contended that the trial court's jurisdiction as to all matters put in issue by the pleadings ceased 30 days after the entry of the final judgment or decree. The appellate court, while noting that the 30 day rule was correctly stated, said:

"[I]ts application favors the petitioner because the issue of fees was not determined by the pleadings. The trial court loses jurisdiction only over those elements of a suit that are finally determined and not over elements of the suit not related to the writ itself.

It is clear the duties of the special State's Attorney extended to whatever appeals the Board might file, and it was necessary to wait 30 days

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following the issuance of the writ to determine if there would be an appeal; therefore, the special State's Attorney could not determine its fees or expenses until the expiration of that period."

11 Ill. App. 3d 666, 668-69.

It is therefore clear, that if jurisdiction is properly established in your circuit court, it can entertain the petition for compensation of the special State's Attorney.

The answers to your remaining questions can be found in the Appellate Court's determination on the County Board's last contention. The County Board, in disputing the amount awarded by the trial court as being too high, argued that the court was not free to exercise discretion in awarding fees because the statute required a special state's attorney to be paid at the same rate of compensation as the state's attorney. The appellate court stated that the phrase "same compensation as provided by law for the state's attorney, apportioned as to the time of service", which appeared in the last sentence of section 6 of said Act, referred only to a special state's attorney appointed to fill a vacancy in the state's attorney's office of more than one year. As to a special state's attorney

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appointed where the state's attorney is "sick or absent, or unable to attend, or is interested in any cause or proceeding", the court noted that statute was silent. In light of this omission, the court stated, at page 669:

"[P]ractical considerations support a construction of the statute which leaves the question of fees to the discretion of the trial court. When an acting State's Attorney is appointed to fill a vacancy, he takes over the entire resources of the office, including staff, clerical personnel, and offices. On the other hand, a special State's Attorney must use his own staff and office resources in the completion of the assigned task. As a result, the net salary of the State's Attorney apportioned for time of service may be insufficient to pay for both the time and overhead expenses of a private attorney."

The appellate court concluded by distinguishing the two cases relied upon by the county board and by stating its holding as follows:

"The Board primarily relies on two cases (Aiken v. County of Will 1943), 321 Ill. App. 171, and Lavin v. Board of Commrs. (1909), 151 Ill. App. 236 (aff'd 1910), 245 Ill. 496), but neither supports its contention. In Aiken, a special State's Attorney argued he was entitled to be paid the salary of the elected State's Attorney for the full time between his appointment and its termination. The court rejected

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this contention, holding that a special State's Attorney could be compensated only for actual time of service, but did not indicate what rate would be applied. In Lavin, the question was whether a special State's Attorney was entitled to any compensation. The court stated he was entitled to compensation and should be 'placed upon the same footing with regard to fees and salaries as the State's Attorney regularly elected,' but specifically declined to determine the extent of the compensation.

We hold that whether the special State's Attorney has been 'placed upon the same footing with regard to fees and salaries as the State's Attorney regularly elected,' and whether, in addition, the overhead expenses of the special State's Attorney should be considered when setting the hourly rate, is a matter for the determination of the trial judge."

11 Ill. App. 3d 666, 669-70.

Consequently, I am of the opinion that the court which appointed the special state's attorney should set his compensation and determine what expenses, if any, should be taken into account in so doing.

Very truly yours,

A T T O R N E Y G E N E R A L