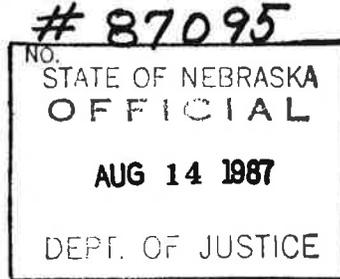


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: August 14, 1987

SUBJECT: LB 223, First Session of the Ninetieth Legislature
(1987); Sheriff's Fees Under Neb.Rev.Stat. §33-117

REQUESTED BY: Bill Shreffler, Hall County Attorney
Michael G. Heavican, Lancaster County Attorney

WRITTEN BY: Robert M. Spire, Attorney General
William L. Howland, Assistant Attorney General

This opinion is issued in response to a number of inquiries made from several counties concerning LB 223 of the First Session of the Ninetieth Nebraska Legislature (1987) which would amend Neb.Rev.Stat. §33-117 and other statutes dealing with Sheriffs fees. We have received a number of inquiries all dealing with the proper meaning to be placed upon various provisions of the Bill which are unclear. The various inquiries and our conclusions will be set forth and discussed separately below.

QUESTION NO. 1: Is a subpoena included within the language "other writ" as set out in §33-117(1)?

Answer: Yes

A "writ" may be defined as:

A precept in writing, issuing from a court of justice, addressed to a sheriff or other officer of the law, or directly to the person whose action the court desires to command, either as to the commencement of a suit or other proceeding or as incidental to its progress, and requiring the performance of a specified act, . . .

Black's Law Dictionary, 5th Edition, 1979. It appears to us that this legal definition of the word writ would include a subpoena. Moreover, cases defining the word "subpoena" indicate that it is a writ directed to a person which requires that person's attendance in order to testify. In re Simon, 297 F. 942 (2nd Cir. 1924); People v. Schwarz, 78 Cal. App. 561, 248 P. 990 (Cal. Ct. App. 1926). Consequently, it is our view that "other writ" as set out in §33-117(1) includes a subpoena.

L. Jay Bartel
Martel J. Bundy
Janie C. Castaneda
Elaine A. Catlin
Dale A. Comer
Laura L. Freppel

Lynne R. Fritz
Yvonne E. Gates
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson

Mel Kammerlohr
Sharon M. Lindgren
Charles E. Lowe
Lisa D. Martin-Price
Steve J. Moeller

Harold I. Mosher
Fredrick F. Neid
Bernard L. Packett
Marie C. Pawol
Jill Gradwohl Schroeder

LeRoy W. Sievers
James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Linda L. Willard

Bill Shreffler
Michael G. Heavican
August 14, 1987
Page -2-

QUESTION NO. 2: If there is more than one subpoena is there a separate \$10.00 charge for each witness served?

ANSWER: No, if the witnesses subpoenaed are additional defendants. Yes, if the witnesses subpoenaed are plaintiffs or persons not a party to the lawsuit.

As a general rule, statutory language will be given its plain and ordinary meaning, and a statute is open to construction only if it is ambiguous. Video Consultants of Nebraska, Inc. v. Douglas, 219 Neb. 868, 367 N.W.2d 617 (1985). However, when language used in a statute is ambiguous, and it becomes necessary to construe it, the principal objective is to determine the intent of the Legislature and give it effect. State v. Parmer, 210 Neb. 92, 313 N.W.2d 237 (1981). In construing a statute, a court must look to objects to be accomplished, evils and mischiefs sought to be remedied, or purposes to be served, and place upon the statute a reasonable or liberal interpretation which will best effect its purpose rather than one which will defeat it. NC+ Hybrids v. Growers Seed Ass'n, 219 Neb. 296, 363 N.W.2d 362 (1985).

Section 33-117(1), as amended by LB 223, provides that the fee for service of a lengthy list of papers (including subpoenas as "other writs") shall be "ten dollars for the first defendant and two dollars and fifty cents for each of the other defendants in the same case." This language is clear on its face and requires no construction. Service of a subpoena, as is the case with the other papers enumerated, costs ten dollars for the first defendant and two dollars and fifty cents for additional defendants.

However, subpoenas and certain other papers listed in §33-117(1) may also be served on plaintiffs and on persons who are not a party to a particular lawsuit. The section is silent as to service fees in those instances, and therefore ambiguous as to what fees should be assessed. Given this ambiguity, it is necessary to analyze the legislative intent behind LB 223.

It is clear that LB 223 was passed to increase the fees charged for service of papers, and to bring those fees more in line with the actual costs of serving the documents. Introducer's Statement of Intent, LB 223, Ninetieth Nebraska Legislature, First Session, January 22, 1987; Remarks of Senator Warner, Floor Debate, Ninetieth Nebraska Legislature, First Session, March 2, 1987, p. 1290. Given this clear intent, it appears to us that multiple subpoenas to non-parties and/or to plaintiffs should cost \$10.00 per service. To conclude otherwise, would have required the Legislature to reduce fees in those instances as is the case with multiple service of summons

Bill Shreffler
Michael G. Heavican
August 14, 1987
Page -3-

upon defendants. As a result, we believe that subpoenas for plaintiffs and persons not party to a lawsuit should cost \$10.00 for each witness served.

The second question raises still another question that has been presented to us for our opinion.

QUESTION NO. 3: Is there a separate charge for each document served?

ANSWER: Yes, beginning on line 10 of the bill a list of documents is set out. Each named document is separated by punctuation, followed by a fee requirement of ten dollars. The language of the bill leaves no room for interpretation. The discussion on the floor of the legislature regarding the compounding of charges for various documents is not controlling. Each initial document served will require a ten dollar fee, and each separate document will require the original ten dollar fee. If the sheriff serves more than one defendant with various documents then each such subsequent document served will result in a reduced fee of two dollars and fifty cents.

QUESTION NO. 4: Are additional documents or subsequent documents for court process to be served for a reduced fee?

ANSWER: Yes, when they are served upon other defendants. No, if they are served upon plaintiffs or non-parties.

As is discussed in response to Question No. 2 above, the clear language of §33-117(1) as amended by LB 223 requires that the enumerated documents be served at a fee of \$10.00 for the first defendant and \$2.50 for additional defendants. Therefore, if the sheriff serves the defendants in a lawsuit with additional documents or subsequent documents, the fees must be \$10.00 for the first defendant and \$2.50 for additional defendants.

As was also discussed above, LB 223 is not clear as to fees for service of documents on plaintiffs or non-parties. Consequently, given the legislative intent of that Bill, service of subsequent or additional documents on those individuals should be at a fee of \$10.00 per service.

QUESTION NO. 5: Is the sheriff entitled to a commission on the gross amount of property sold under an order of sale or attachment?

ANSWER: Yes.

Bill Shreffler
Michael G. Heavican
August 14, 1987
Page -4-

The deletion of the proviso in the old statute was intended to affect the amount collected by the sheriff when property is sold and/or redeemed by the mortgagors. Prior to LB 223 the statute had been interpreted by the Nebraska Supreme Court in Munich v. Hall, 181 Neb. 571, 149 N.W.2d 527 (1967). In Munich the court held that when a mortgagor redeemed his property, the sheriff was not entitled to a commission because no money had ever come into his hands. However, the legislative record shows a clear intent to change this very situation and permit the sheriff to charge a fee or commission based upon the gross amount of the sale. There is currently no exception providing for the reduction of the commission to reflect the impact of net proceeds.

QUESTION NO. 6: What constitutes making a certified copy?

ANSWER: If the sheriff is provided copies of court documents which have been certified by the clerk of the court, then the sheriff is not entitled to charge or collect a fee for certifying copies. On the other hand, if the sheriff is required to make a copy of any court document and certify to its authenticity and accuracy, then the sheriff is entitled to collect the \$5.00 fee. It is the act of making the certification that constitutes the service performed by the sheriff. Therefore if the sheriff performs the service, the fees result. Merely xeroxing an existing certified copy does not constitute "making a certified copy." However, when the sheriff does read the copy to verify that it is true and then stamps it as such, a certified copy has been prepared. The intent of the Legislature again was to increase the fees received by the sheriff for his services. The act performed by the sheriff in reading and verifying the copy constitutes the service which results in a fee for such service.

QUESTION NO. 7: What fee results when a writ of restitution is accompanied by instruction to return with "no goods or chattel."

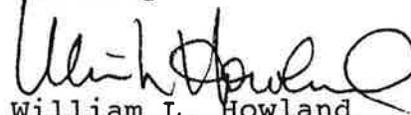
ANSWER: \$15.00. The sheriff is required to make a good faith effort to inquire into the assets of any judgment debtor and mere instruction from the issuing party to return the writ with no goods and chattels constitutes a request only. The sheriff is required to make an independent determination and to make an appropriate return notwithstanding specific instructions

Bill Shreffler
Michael G. Heavican
August 14, 1987
Page -5-

from the issuing party. As a result of service being performed by the sheriff, the fee is established by the Legislature results.

Respectfully submitted,

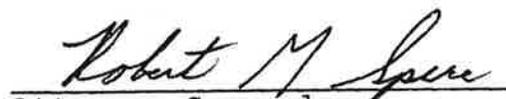
ROBERT M. SPIRE
Attorney General



William L. Howland
Assistant Attorney General

WLH/bae

APPROVED:


Attorney General