

VOLUME NO. 44

OPINION NO. 29

ATTORNEYS GENERAL - Supervisory power over county attorneys;
COUNTY ATTORNEYS - Employment status of county attorney under Montana Comprehensive State Insurance Plan and Tort Claims Act;
COUNTY COMMISSIONERS - Employment status of county attorney under Montana Comprehensive State Insurance Plan and Tort Claims Act;
COUNTY COMMISSIONERS - Supervisory power over county officers;
COUNTY OFFICERS AND EMPLOYEES - Employment status of county attorney under Montana Comprehensive State Insurance Plan and Tort Claims Act;
MONTANA CODE ANNOTATED - Sections 2-9-101, 2-9-305, 2-9-318, 2-15-501(4), 7-3-432, 7-4-2110, 7-4-2203, 7-4-2502(2)(a), 7-4-2702, 7-4-2711, 7-4-2712, 7-4-2716, 15-8-102;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 84 (1988), 40 Op. Att'y Gen. No. 52 (1984), 38 Op. Att'y Gen. No. 85 (1980), 36 Op. Att'y Gen. No. 32 (1975), 17 Op. Att'y Gen. No. 196 (1937).

HELD: County attorneys are "employees" of the county for purposes of the Montana Comprehensive State Insurance Plan and Tort Claims Act, § 2-9-305, MCA, whenever a county attorney is named in a civil lawsuit for his actions regarding county administrative business, such as the hiring and firing of staff.

March 13, 1992

John S. Forsythe
Rosebud County Attorney
Rosebud County Courthouse
Forsyth MT 59327

Dear Mr. Forsythe:

You have requested my opinion on the following question:

Is the county attorney a state employee for purposes of the Montana Comprehensive State Insurance Plan, §§ 2-9-101 to 318, MCA?

Your question concerns whether a county attorney is an employee of the county or the state for purposes of section 2-9-305, MCA, a part of the Montana Comprehensive State Insurance Plan and Tort Claims Act of 1973 (hereinafter

Tort Claims Act). The underlying facts in the present situation involve a county employee who was discharged from employment in the county attorney's office. The employee subsequently filed a claim for wrongful termination against the county and the county attorney. The county attorney requested that the state defend him pursuant to the Tort Claims Act.

Section 2-9-305, MCA, provides in pertinent part:

(2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope of the employee's office or employment, *the governmental entity employer ... shall defend the action on behalf of the employee and indemnify the employee.* [Emphasis added.]

....

(4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the employer for any money judgments or legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result of the suit[.]

Initially, it should be noted that under certain circumstances a county attorney is not liable for civil damages. A county attorney is a "quasi-judicial officer who enjoys common law immunity from civil liability for conduct *within the scope of his duties.*" This allows him to use independent judgment in enforcing criminal laws. Ronek v. Gallatin County, 227 Mont. 514, 740 P.2d 1115, 1116, cert. denied, 485 U.S. 962 (1978) (emphasis added). Thus, for example, "[w]hen a prosecutor acts within the scope of his duties by filing and maintaining criminal charges he is absolutely immune from civil liability." State ex rel. Dept. of Justice v. District Court, 172 Mont. 88, 92, 560 P.2d 1328, 1330 (1977).

By contrast, the administrative business of running a county attorney's office, including the hiring and firing of staff, does not fall within those statutorily defined duties which are clearly prosecutorial in nature and to which prosecutorial immunity unquestionably applies. See § 7-4-2712, MCA. Cf. Mead v. McKittrick, 223 Mont. 428, 727 P.2d 517 (1986) (judicial immunity applied to firing of personal secretary of state district court judge because secretary's duties were intimately related to functioning of judicial process). Thus, when a suit involving the performance of administrative responsibilities is brought against a county attorney, it must be determined whether the county attorney is an "employee" of the state or the county so as to determine which governmental entity may be responsible for indemnification, if necessary.

Previous questions concerning a county attorney's employment status have been determined by reference to the relevant statutes. With respect to employee benefits, the Montana Supreme Court, as well as former attorneys general, have examined the particular statutory language to determine who is a county officer's employer for purposes of administering benefits. Former Attorney General Woodahl concluded that a county attorney is considered to be jointly employed by the county and the state for social security purposes. 36 Op. Att'y Gen. No. 32 at 366, 368 (1975). The opinion, citing State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411 (1927), held that a county attorney is not technically an "employee" of either the state or the county. However, for the purpose of interpreting the Tort Claims Act, a county attorney must be considered an employee of either the state or a county.

More recently, former Attorney General Greely determined that for the purposes of participation in group health insurance programs, the Legislature intended to exclude county attorneys from the state group insurance plan. 40 Op. Att'y Gen. No. 52 at 212, 215 (1984).

With respect to the statutes which deal with a county attorney's compensation, a 1937 Attorney General's Opinion recognized that a county attorney, as a public officer, performs tasks for both the county and the state. 17 Op. Att'y Gen. No. 196 at 238 (1937). See also §§ 7-4-2711, 7-4-2712, 7-4-2716, MCA. As a result of the dual nature of the county attorney's duties, the Legislature required the state and the county to evenly split the county attorney's salary. § 7-4-2502(2)(a), MCA. Consequently, the statutes that define a county attorney's duties and address which governmental entity pays the salary do not clearly designate a county attorney as an employee of either the state or the county.

With specific reference to the statutes on indemnification of a public employee in a tort action, the Montana Supreme Court has relied upon the tenets of a "master-servant" relationship to assist in determining which governmental entity is responsible for an employee's conduct. See State v. District Court, 170 Mont. 15, 19-20, 550 P.2d 382, 384 (1976) (city, rather than state, may be held liable for conduct of city police within course and scope of their employment). The two factors the Court examined to determine the existence of a master-servant relationship in State v. District Court were: (1) which governmental entity had the exclusive power to hire and fire the employee, and (2) which governmental entity exercised direct, detailed or daily supervision over the employee, and therefore was in the best position to avoid or prevent negligent acts by the employee. *Id.* at 19-20, 550 P.2d at 384. In 42 Op. Att'y Gen. No. 84 at 333 (1988), former Attorney General Greely employed the Court's reasoning in State v. District Court to determine that a fire district rather than the county must indemnify fire district employees under the Act.

Applying the first of the two factors examined in State v. District Court, *supra*, to the instant case, it is significant that the local government statutes provide

that the county attorney must be elected by county voters or appointed by the county commission or its chairman. See § 7-3-432, MCA. The state as a governmental entity does not participate in the selection of a county attorney. If vacated, the position of county attorney is filled by appointment of the county commissioners. § 7-4-2702, MCA.

With respect to the second factor examined by the court in State v. District Court, *supra*, section 7-4-2110, MCA, the statute that addresses supervision of county officers, must be reviewed.

Supervision of county and other officers. The board of county commissioners has jurisdiction and power, under such limitations and restrictions as are prescribed by law, to:

- (1) supervise the official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, management, or disbursement of the public revenues;
- (2) see that they faithfully perform their duties;
- (3) direct prosecutions for delinquencies; and
- (4) when necessary, require them to renew their official bonds, make reports, and present their books and accounts for inspection.

Section 7-4-2110, MCA, has been construed by the Montana Supreme Court and by a former attorney general. In 1980 former Attorney General Greely concluded that the statute granted the board of county commissioners supervisory power over all of the county executive officers (including county attorneys) that are listed in section 7-4-2203, MCA, with the possible exception of justices of the peace. 38 Op. Att'y Gen. No. 85 at 294 (1980). The opinion holds that the "county commissioners, in the exercise of their statutory supervisory control over county officers, may assure that the officers fulfill their statutory duties, but may not assume control over the manner in which those duties are performed." *Id.* at 297.

The Montana Supreme Court has more recently addressed section 7-4-2110, MCA, in Cantwell v. Geiger, 228 Mont. 330, 742 P.2d 468 (1987). In Cantwell, the Court noted that section 7-4-2110, MCA, gave the county commissioners supervisory power over a county assessor "under such limitations and restrictions as are prescribed by law." The Court then held that section 15-8-102, MCA, a statute amended in 1973 to make county assessors agents of the Department of Revenue, is such a limitation as prescribed by law. Cantwell, 228 Mont. at 333-34, 742 P.2d at 470. The circumstances in Cantwell are distinguishable from those present in this inquiry, since there is

no statute comparable to section 15-8-102, MCA, that specifies that a county attorney is an agent of state government.

Section 2-15-501(4), MCA, which addresses the attorney general's supervisory powers over county attorneys, is also relevant to this discussion. It provides:

General duties. It is the duty of the attorney general:

....

(4) to exercise supervisory powers over county attorneys in all matters pertaining to the duties of their offices and from time to time require of them reports as to the condition of public business entrusted to their charge. The supervisory powers granted to the attorney general by this subsection include the power to order and direct county attorneys in all matters pertaining to the duties of their office. The county attorney shall, when ordered or directed by the attorney general, promptly institute and diligently prosecute in the proper court and in the name of the state of Montana any criminal or civil action or special proceeding.

Although under section 2-15-501(4), MCA, the attorney general has the power to direct county attorneys in all matters pertaining to the duties of their office, this authority does not extend to the exercise of daily supervision over the conduct of administrative affairs of a county attorney's office. The Montana Supreme Court in State v. District Court, *supra*, focused upon the question of which governmental entity exercises *direct, detailed or daily supervision* over employees and is therefore in a better position to avoid or prevent negligent acts by employees. Under the facts of the present inquiry, the alleged wrongful conduct involved administrative business of the county attorney's office, i.e., the termination of a county employee. It is more likely that the board of county commissioners would be aware of such matters and would be in a better position to avoid or prevent negligent acts by a county attorney regarding such administrative acts. Thus, in the context of the performance of discretionary administrative acts such as the hiring and firing of staff, the relationship between the county attorney and the board of county commissioners more closely resembles a master-servant relationship for the purposes of the Tort Claims Act.

THEREFORE, IT IS MY OPINION:

County attorneys are "employees" of the county for purposes of the Montana Comprehensive State Insurance Plan and Tort Claims Act, § 2-9-305, MCA, whenever a county attorney is named in a civil lawsuit for his actions regarding county administrative business, such as the hiring and firing of staff.

Sincerely,

MARC RACICOT
Attorney General