

County Commissioners, Power of to Engage Counsel. Power, of County Commissioners to Engage Counsel. Fees of Counsel, Paid Out of General Fund. County Attorney, Bondsmen of. Bondsmen of County Attorney, Liability of. Expenses of County Attorney. Sick, Poor and Infirm, What Are.

The board of county commissioners is not warranted by law in incurring expense by the employment of counsel to advise them respecting official powers, duties or acts; county commissioners may employ counsel in civil cases to which the county is a party; but not in criminal matters. Attorneys employed by commissioners in proper cases should be paid out of the general fund, the amount of such compensation being a matter within the discretion of the board of county commissioners,—the bondsmen of the county attorney are not

liable for funds so paid, out by the county commissioners. The poor, sick and infirm are defined by Sections 2050, 2060, Revised Codes, Montana, and prescribes that the county commissioners have control thereof. Expenses incurred by a county attorney in transporting prisoners from one jurisdiction to another are not proper charges against the county.

January 27th, 1914.

Board of County Commissioners,
Fort Benton, Montana.

Gentlemen:

I am in receipt of your request for my opinion upon the six following questions:

"First—Is the board of county commissioners of this county authorized or empowered in law to engage the services of an attorney at law, other than the county attorney, to advise us concerning our official duties or rights, and for that purpose to attend our sessions; to represent the county in suits pending, or in criminal matters?"

"Second—From what funds should such attorney be paid, and in what amount?"

"Third—May we hold the county attorney or his bondsmen for any amounts so paid by us?"

"Fourth—What constitutes the sick, poor and infirm of a county, and in a county of the class of this county, what, if any, official determines the necessity for public assistance?"

"Fifth—May the county attorney lawfully present to the board of county commissioners a bill for 'expense incurred in transporting a prisoner from the county jail to another county for delivery to the federal authorities upon a federal charge?"

"Sixth—May the county attorney lawfully present to the county or be interested in a bill or claim for 'premiums upon officers' bonds,' not including his own bond?"

The first question may be divided into three parts:

1. Has the board power to employ the services of private counsel to advise them concerning the official duties or rights and where such counsel attend the meetings of the board?
2. Has the board authority to employ the services of private counsel to represent the county in pending actions?
3. Has the board authority to employ private counsel in the prosecution of criminal matters?

Upon the first of these, this office on March 2, 1910, rendered an opinion to the board of county commissioners of Sanders County, which opinion is found in Vol. 3 of the Official Opinions of Attorney General, page 323 to which opinion you are referred. It was held in that case that:

"The board of county commissioners is not warranted in incurring expense by the employment of counsel to advise

them with respect to their official powers, duties or acts, on account of the fact that they may, if not satisfied with the opinion of their county attorney, direct their questions in this regard to the attorney general."

I am of the opinion that this former opinion correctly states the law upon this subject, and that such authority does not rest with the board of county commissioners.

As to the second of these questions contained in your first inquiry, I will say that this office under date of September 9th, 1905, in an opinion to Hon. Thomas E. Healy, county attorney of Silver Bow County, which opinion is found in Vol. 1 of the Official Opinions of Attorney General, page 190, to which you are hereby referred, held that boards of county commissioners have power to employ counsel in civil cases but not in criminal matters. This opinion was reached by a consideration of the statutory provision in regard to county attorneys, and their duties defined by Sec. 3052, Revised Codes of Montana, 1907, which provision makes it his duty to

"Attend the district court and conduct on behalf of the state all prosecutions for public officials, and represent the state in all matters and proceedings to which it is a party, or in which it may be beneficially interested," etc.

It was held that there was no authority for hiring special prosecutors in criminal cases. It was also held that under Subdiv. 15 of Sec. 2894, Revised Codes of Montana 1907, that the commissioners had the power to employ counsel in civil cases to which the county is a party when the public interest demands the same. I am of the opinion that this opinion reaches the correct conclusion in these matters.

Your second question, as to what fund should be used in the payment of an attorney hired by the county commissioners: I find no express provision naming any fund from which the same should be taken, and am, therefore, of the opinion that such expense for hire would come out of the general fund of the county. By an opinion of this office dated June 11th, 1906, addressed to the county commissioners of Gallatin County, found in Vol. 1, Opinions of Attorney General, page 351, it was held that if such assistant was appointed he should receive the same compensation as a deputy or assistant would receive, under the provisions of the law, as it then stood. However, our law has been amended in regard to deputies and assistants of county attorneys by Chap. 132, Session Laws of the Twelfth Legislative Assembly, so that the number of such deputies and their salaries are now fixed by statute, hence the former opinion would hardly be applicable in this case. I must therefore, hold that this is a matter within the reasonable discretion of the board of county commissioners, having regard to the services performed.

Under the above holdings, in answer to the first two questions, it seems plain that the bondsmen of the county attorney could not be held for funds paid out for such services by the county commissioners.

The answer to your fourth question is found in Sec. 2050 et seq. Sec. 2050, Revised Codes of Montana, is as follows:

"The board of county commissioners are vested with entire and exclusive superintendence of the poor."

Sec. 2060 reads as follows:

"Any person seeking relief must make application to any part of the board, who before granting the order for relief must require satisfactory evidence that he has been a resident of the county for two months immediately preceding the day upon which the application is made."

These two sections read together impose upon the board of county commissioners and the members thereof the whole duty of determining in what instances county assistance shall be given to the poor, and Sec. 2051 and Sec. 2053 define those persons who are entitled to relief from the county. The provisions are so plain that I think no explanation is needed. It is a matter of fact in each case to be determined by the board of county commissioners.

I have examined the provisions of our law carefully in regard to the expenses of a county attorney, and I find no provisions therein authorizing him to transport prisoners from one county to another for delivery into the hands of federal authorities, nor any provision for incurring expenses on account of such action. The jurisdiction over prisoners, the transfer of those accused of crime from one jurisdiction to another, is, I think, a duty of the sheriff or some person appointed by the court. I am unable to see, therefore, how a county attorney could lawfully make any charge to the county on account of such services, and I think that such a claim is not one which can be allowed by the county commissioners.

I will be unable to answer your sixth question until I have more definite information as to how the claim arises. You state no facts upon which I may form an opinion, and I am therefore withholding an answer until you can give me more definite information as to the nature of the claim, and the manner in which it arises.

Yours very truly,

D. M. KELLY,
Attorney General.