

Criminal Law, Employment of Counsel. Board of County Commissioners. Power to Employ Counsel in Criminal Cases. Special Counsel, Employment of in Criminal Cases. Actions, Criminal, Employment of Special Counsel in. County Commissioners, When May Employ Special Counsel.

Under the provisions of Chapter 61, Laws of 1909, the Board of County Commissioners have authority to employ special counsel to aid in the prosecution of criminal actions where the welfare of the county actually requires such employment.

November 30, 1915.

Hon. H. S. Wolfe,
County Attorney,
Malta, Montana.

Dear Sir:

I am in receipt of your letter of the 28th instant, submitting the question:

"Has the Board of County Commissioners authority to employ special counsel to prosecute, or to assist in the prosecution

of a criminal case?"

This question was before this department on inquiry submitted by the Board of County Commissioners of Chouteau County, and holding made to the effect that the county board did not possess such authority.

Opinions Attorney General 1912-14, 426.

This opinion appears to be based upon two prior opinions rendered by this office, which, however, in the light of more recent statutes did not sustain the conclusions reached. The opinion of this department referred to therein, as reported in Opinions of Attorney General, 1908, 10, at page 322, has reference to the authority of the county board to hire general counsel to advise them generally with respect to such matters as they may submit to him for consideration, and it was there held that the Board did not possess that authority. That opinion still stands as the correct exposition of the law on that subject, and for the reasons therein stated. The other opinion referred to, as reported in Opinions Attorney General, 1905-06, at page 190, affirmatively holds to the effect that the Board at that time was not vested with the authority to employ special counsel in a criminal action, but that such counsel must operate, if at all, under appointment or permission of the court, and not by virtue of employment by the Board of County Commissioners. This latter opinion was rendered in 1905. Since that time, however, the legislature has enacted a statute relating to this subject which took effect March 3, 1909, in which it is provided that the Board of County Commissioners has the power, except in counties of the first class, "to employ or authorize the county attorney to employ special counsel to assist in the prosecution of any criminal cases pending in such county." The Supreme Court of this state has in several cases considered the question of the employment of special prosecutor, but only with reference to the rights of the defendant, and in no case with reference to the liability of the county as to compensation.

State v. Whitworth, 26 Mont., 107, 66 Pac. 748;

State v. Tige, 27 Mont., 327, 71 Pac. 3;

State v. O'Brien, 35 Mont. 482, 10 Ann. Car. 1006 90 Pac. 514.

In the O'Brien case the court refers to the question as to the authority of the board to pay out public money for such purposes, but leaves the question undecided. Hence, in this state we have no utterance from our Supreme Court to the effect that the Board of County Commissioners is authorized to expend public money in the employment of special counsel to assist in the prosecution of criminal actions. Chapter 61, Session Laws of 1909, above referred to, confers the power upon the Board to employ special counsel but makes no direct statement whatsoever as to the authority of the board to expend public moneys for such purpose. However, if the board has the right "to employ" it most probably has the right to pay for such employment, for it cannot be presumed that employment without compensation could be attained. Hence, the power to pay is necessary to carry into effect the direct power conferred upon the board "to employ." This power, however, is not to be arbitrarily exercised by the board. The people of the

county elect the public prosecutor. By law it is his duty to prosecute criminal actions.

Section 3052, Revised Codes.

The employment of special counsel is extraordinary. Hence, it can be resorted to only when the circumstances render it actually necessary. Actual necessity must exist, or the employment of special counsel would be an abuse of discretion; and the compensation allowed such special counsel must also be reasonable, or it will again be an abuse of discretion which may render the members of the board liable on their official bonds. In other words, it is a power to be exercised with caution. Any taxpayer may call the action of the board into question by an appeal (Sec. 2947), or perhaps later by a direct action for the unwarranted expenditure of public moneys.

Yours very truly,

J. B. POINDEXTER,

Attorney General.