

**County Officers—Absence of County Officers from State  
—Vacancy in County Office, When—County Commissioners  
Declaring County Office Vacant—Legislators Filling County  
Officers by Appointment—Legality of Appointment of Mem-  
ber of Legislature to Fill County Office.**

If a County Attorney absents himself from the state for any period of time whatever without the consent of the county commissioners, the office becomes ipso facto vacant and the Board of County Commissioners may fill the vacancy by appointment. The Board may however, give their consent to the absence of such officer for a period not to exceed sixty days but no longer; in which case, the office could not become vacant until the expiration of such period.

A member of the legislature cannot be legally appointed to the office of county attorney during the period of time for which he was regularly elected as a member of the legislature.

Sept. 14th, 1918.

Mr. Dwight N. Mason,  
Deputy County Attorney,  
Missoula, Montana.

Dear Sir:

I am in receipt of your letter of the 9th inst., requesting my opinion upon the following questions of law:

1. In the absence of the County Attorney in the Military Service of the United States, where such service takes him outside of the State of Montana, can the County Commissioners declare his office vacant and appoint some one to fill the vacancy, and if so do they have the authority to fill the office at once or is there a statutory period within which they can or cannot fill such vacancy?

2. If they have the power to declare the office vacant at any time, can they fill the vacancy by appointing a member of the Legislature as County Attorney, or one who would, if appointed County Attorney, be serving as such during the period of time for which he was regularly elected as a member of the Legislature?

Section 419, Subdivision 6, provides that the absence of an officer from the state, without the permission of the legislative assem-

bly, beyond the period allowed by law, is a resignation of the office, while Section 420, Subdivision 6, provides that an office becomes vacant when an officer is absent from the state, without permission of the legislative assembly, beyond the period allowed by law. Both of these sections have reference to both state and county officers.

Section 2971 provides that a county officer must, in no case, absent himself from the state for a period of more than sixty days, and for no period without the consent of the Board of County Commissioners, and if he does so absent himself he forfeits his office.

Sections 419, 420 and 2971 must be read together. The period of time during which a county officer may absent himself from the state, with the consent of the Board of County Commissioners, is fixed by Section 2971, but under Subdivision 6 of Section 419, and under Subdivision 6 of Section 420, this period of time may be extended by the legislature.

My understanding of the meaning of Section 2971 is that a county officer must not absent himself from the state for any period without the consent of the Board of County Commissioners, and that the Board of County Commissioners cannot consent to such officer being absent from the state for more than sixty days, although the legislature may grant such officer permission to be absent more than sixty days, and if an officer absents himself from the state for any period of time whatever without the consent of the Board of County Commissioners, or if he obtains the consent of the Board of County Commissioners to absent himself from the state for sixty days and remains absent for more than sixty days, without having procured from the legislature permission to do so, the office ipso facto becomes vacant.

People ex rel. vs. Shorb et al., 35 Pac. 163.

Answering your first question it is my opinion that if a County Attorney absents himself from the state for any period of time whatever, without the consent of the Board of County Commissioners, the office becomes ipso facto vacant and the Board of County Commissioners may fill the vacancy by appointment, immediately upon ascertaining the fact of such absence without consent. If, however, the Board of County Commissioners has given its consent to such officer's absence from the state for a period of sixty days there is no vacancy in the office, and the Board cannot appoint any person to fill a vacancy in the office, until the sixty days have expired, but immediately upon the expiration of such sixty days, if the officer still remains absent and has not procured permission from the legislature so to do, the office becomes ipso facto vacant and the Board of County Commissioners may then fill such vacancy by appointment.

A County Attorney is an officer of the judicial department of the state (32 Cyc. 689), while a member of the legislature is an officer of the legislative department (Sec. 1, Art. V, Const.)

Senators shall be elected for a term of four years, and representatives for a term of two years (Sec. 2, Art. V, Const.). The term of service of members of the legislative assembly begins the next day after their election (Sec. 6, Art. V, Const.). It therefore follows that the term of a senator begins the day following his election and ter-

minates with the day of the general election four years thereafter, while the term of a member of the house begins the day after his election and terminates on the day of the next general election two years thereafter, and that during said periods they are officers of the legislative department. If a senator or a member of the house is re-elected on the election day that his term expires, his new term begins immediately on the next day and continues until his term expires, and during all of such term beginning with the day after the election at which he is re-elected he is an officer of the legislative department.

Section 1 of Art. IV of the Constitution divides the powers of the state into three departments, legislative, executive and judicial, and prohibits any person charged with the exercise of powers properly belonging to one of these departments from exercising any powers properly belonging to either of the others, while Sec. 7 of Art. V prohibits a senator or representative from being appointed to any civil office under the state during his term of office.

Answering your second question, I am of the opinion that if a vacancy should occur in the office of County Attorney before the next general election day November 5th next, the Board of County Commissioners cannot appoint to fill such vacancy any person who is now holding office as a senator or representative and whose term of office will not expire until such day of election, and that if such a vacancy shall occur after November 5th next the Board of County Commissioners cannot appoint to fill such vacancy a person elected as a senator or representative at the election held on such day.

Truly yours,

S. C. FORD,

Attorney General.