

**Drainage Commissioner, County—Counsel For, Special—  
County Attorney, Duties.**

Where there is a conflict in the duties of the county attorney in discharging the functions of his office with those he performs for a county drainage commissioner, special counsel should be appointed for the drainage commission.

October 9, 1919.

Mr. M. L. Parcels,  
County Attorney,  
Columbus, Montana.  
Dear Sir:

I have your letter of August 19th, 1919, in which you make inquiry as to the duties of the county attorneys under the drainage laws of the State of Montana as enacted by Chapter 106 of the Laws of 1905, found in our Revised Codes of 1907 under Sections 2403 to 2497 inclusive, and amended by Chapter 144 of the Laws of 1909.

This law contains various provisions which, if followed by a county attorney, will place him in a position where he discharges conflicted services. The act as provided by Section 2460 of the Revised Codes of 1907 reads as follows:

“In any suit brought to set aside any drain tax, in any way attacking the legality of any drain proceedings, the county drain commissioner shall be made a party to said suit, and it shall be the duty of the prosecuting attorney of the county where said drain is situated to defend said drain proceedings.”

The Act is detailed in its provisions and gives all persons adversely affected by the action of a county drain commissioner the right of appeal. The Act also provides that lands belonging to the State of Montana may be assessed for benefits conferred upon such land by drainage. It also provides that counties in which drainage districts are established may be assessed for benefits derived from such drain from the standpoint of health or improvement of roads. Both the state and county is contemplated by the Act as a party which may be adversely affected by the action of the drain commissioner and both are given the right of appeal from such action. The Act as found in Section 2484 of the Revised Codes of 1907 provides as follows:

“In all proceedings under this Act when the state shall be an interested party and liable to be assessed for benefits, it shall be the duty of the prosecuting attorney of the county in which such lands are situated, to represent the interests of the state, and to appear in its behalf, and he shall make a report of his actions in each case to the register of the land office.”

The Act further provides by Article 4, Section 2, Chapter 144 of the Laws of 1909, as follows:

“Any county or counties assessed a per cent for benefits for the construction of any drain that may conceive itself or themselves aggrieved by the assessment made by the county drain commissioner, may, within ten days after the date of review provided for by the preceding section, appeal therefrom as herein provided.”

The law further provides in the matters of appeals by Section 2439 of the Revised Codes of 1907 as follows:

"The county drain commissioner shall thereupon give notice to the persons so appointed of their appointment, and of the time and place of meeting, and shall give notice of such meeting by posting notices in at least five public places in each district affected by such assessment, and shall serve a like notice upon the appellant if he be a resident of any district affected and upon the county attorney of the county in all cases where the state or county is an interested party."

It will readily be seen from the portions of the law quoted above that the county attorney might find himself in a position where he is unable to discharge all the duties imposed upon him by the law because of the fact that he represents adverse parties. It cannot be said that the county attorney might bring an action on behalf of the state or county against the county drain commissioner to annul or supervise whatever action he may have taken and at the same time appear for such county drain commissioner in defense of his action. I am therefore of the opinion that when such a situation arises, either the county or the drain commissioner must be represented by special counsel. It therefore becomes necessary to ascertain whether or not either one of such parties may employ special counsel.

The general rule of law governing the conduct of county attorneys is as follows:

"It is the duty of county attorneys to appear for the state or county, notwithstanding the law makes provision for the employment of other counsel in special cases, and the control of the case cannot be taken from him and given to those so employed."

23 Cyc. 711; Sheridan County vs. Hanna, 9 Wyo. 368; 63 Pac. 1054.

The county attorney is a constitutional officer for the county and state. Each contribute to the payment of his salary. The drainage law itself makes it mandatory for the county attorney to represent the state and provides that when an appeal is taken the drainage commission must serve notice upon the county attorney for and in behalf of the county (Supra.) A drainage district does not affect the whole county. It would therefore not be just for the county to represent that portion of the county covered by a drainage district and ask the whole county to pay for the service of a special attorney employed to represent the county in such case. Justice would be more nearly administered in employing special counsel to assist the drainage commissioner and charge such expense to the particular district involved.

By Articles 2 and 4 of the Drainage Act, both as originally enacted in 1905 and as amended by Chapter 144 of the Laws of 1909, the Act contemplates that all costs of investigation, construction and operation shall be assessed against the property of the persons affected thereby. The law does not expressly so state—but actually contemplates that the county attorney shall be the attorney for the drainage commission—yet where the county attorney cannot act for both the county and the county drainage commission, I am of the opinion that it would be proper to appoint special counsel to assist such drainage commission and add the expense thereof

to the total expense to be assessed against the land involved for the construction and maintenance of such drainage district. Application for the service of such counsel should be made by the drainage commissioner to the county commissioners and the reason therefor given. Under subdivision 1 of Section 2394 as amended by Chapter 15 of the Laws of 1929, the county commissioners are given power "to supervise the official conduct of all county officers and officers of all districts and other subdivisions of the county, charged with assessing, collecting, safe keeping, management or disbursement of the public revenues; etc."

I am of the opinion that under the circumstances which you present, the county commissioners not only may but should, appoint a special attorney to represent the county drain commissioner.

Respectfully,

S. C. FORD,  
Attorney General.