

**Attorneys—Counties—Compensation—Contingent Fee—
County Commissioners—Special Counsel—Actions.**

County Commissioners may employ special counsel to assist in the prosecution of civil actions to which the county is a party.

A county can contract that the compensation of special counsel should be wholly or partially contingent, based upon a percentage of the amount recovered.

L. Q. Skelton, Esq.,
State Examiner,
Helena, Montana.

My dear Mr. Skelton:

You have asked my opinion upon the following questions:

1. "Has a Board of County Commissioners authority to engage the services of an attorney at the expense of the county to make collections by suit that should have been made by former County Attorneys?"

2. "Has the Board of County Commissioners authority to engage the services of an attorney by contract to make collections that should have been made by former County Attorneys?"

3. "Has a Board of County Commissioners authority to engage the services of an attorney on a percentage basis?"

With reference to the first two questions, there can be no doubt of the authority of the Board to employ special counsel to assist in prosecutions of civil actions to which the county is a party. This is expressly provided for by Section 4486, R. C. M. 1921, and this power has been recognized by prior Attorneys General of the State of Montana, in opinions found in Volume 3 at page 322 and in Volume 5 at page 426 of the Opinions of the Attorney General.

With your request for opinion you also enclosed a copy of resolution of the Board employing special counsel, from which it appears that the attorney was to assist the County Attorney in prosecuting suits against former county officials to recover moneys alleged to have been illegally allowed and paid, and compensation of the attorney to be upon a contingent basis, and to be a certain percentage of "the funds actually returned to the county by virtue of the services of himself and County Attorney" and to be paid out of said funds. It is my opinion that the Board had authority to employ special counsel for the prosecution of these suits.

With reference to your third question, generally speaking, there seems to be no reason why, in the absence of statutory prohibition, the county may not agree that the compensation of special counsel should be partially or wholly contingent, and based upon a percentage of the amount recovered. There are a number of cases sustaining such an employment by the county:

Lassen County vs. Shinn, 88 Cal. 510, 26 Pac. 365.
Kelley vs. Sersanous, 5 Cal. UnRep. 485, 46 Pac. 299.
Power vs. May, 123 Cal. 147, 55 Pac. 796.
Knight vs. Ashland, 61 Wis. 233, 21 N. W. 65.
Logansport vs. Dykeman, 116 Ind. 15, 17 N. E. 587.

It is my opinion that the Board of County Commissioners has authority to agree that the compensation of an attorney employed to assist the County Attorney in the prosecution of a civil action, may be contingent and based upon a percentage of the amount recovered, provided the compensation based upon such percentage is reasonable.

In the instant case it appears that the compensation of the attorney was to be paid out of the moneys recovered in the suits, and payment was entirely contingent upon the recovery of the moneys. By reference to a copy of the claim of the attorney presented to the Board it appears that he is asking for the payment of \$300.00 in three suits therein mentioned to which the county of Musselshell was a party, and the following notation is made thereon:

"The above claims being for retainer as per contract and further compensation, if any, being contingent as provided in said contract of employment in the 3 cases above named."

The copy of the resolution whereby the attorney's services were secured, fails to disclose any agreement or understanding that a retainer was to be paid the attorney, but on the contrary it appears therefrom that "he be employed upon a contingent basis," and that he "is to receive his remuneration out of funds actually returned to the county by virtue of the services of himself and the County Attorney." The whole of the attorney's compensation is contingent upon recovery in the suits, as is likewise the amount of his compensation, and the Board is therefore not authorized to pay this claim for \$300.00 as a retainer. Should the suits fail to return any of the money to the county the attorney would not be entitled to any compensation because payment is conditioned upon that contingency, and if they did result in a return of some of the money to the county the compensation would only be for a percentage thereof, which might not equal the amount asked for in this claim. Furthermore, until the money is received by the county there is no fund out of which the claim may be paid, as it can only be paid out of the moneys recovered in the suits.

It is, therefore, my opinion that the claim presented for \$300.00 as a retainer is not within the contract of employment for the reasons above stated, and cannot lawfully be allowed by the Board.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.