

Opinion No. 158.

Attorney General—Duties—Opinions
of—Force and Effect.

HELD: The Attorney General, being the legal adviser of the legislative assembly, of all state officers, boards and commissions, and of the county attorneys and county commissioners, and being clothed by law with supervisory power over county attorneys, his opinions are binding upon such officials until reversed or modified by judicial decision.

September 17, 1937.

Hon. I. M. Brandjord
Administrator State Department
of Public Welfare
Helena, Montana

Dear Sir:

You have submitted the inquiry as to whether or not county officials are bound by the construction of a statute, as placed upon the same in the Attorney General's opinions, and in the absence of judicial decision to the contrary.

The Constitution and the statutes, generally and specifically, constitute the attorney general the legal adviser to the various state officials, state departments, county attorneys, boards of county commissioners, and other county officials.

Section 1, Article VII of the Constitution provides that the attorney general shall perform such duties as are prescribed by the Constitution and the laws of the state.

Section 199, R. C. M., 1935, provides:

"It is the duty of the attorney general: (Section 6)

"To give his opinion in writing, without fee, to the legislative assembly, or either house thereof, and to any state officer, board, or commission, any county attorney, and to the board of county commissioners of any county of the state, when required upon any question of law relating to their respective offices."

In the same relationship as the attorney general is the legal adviser to the state officials, the county attorney is

the legal adviser to the county officials. The attorney general occupies an appellant position in his relation to the county attorney, comparable to the position the supreme court occupies to the district courts. The attorney general may direct the county attorneys in all criminal and civil cases and in all other legal matters, including opinions the county attorneys may render to the county officials. He has the power to reverse, affirm, or modify opinions rendered by a county attorney to the county officials.

Paragraph 5 of Section 199, R. C. M. of 1935, provides:

"[It is the duty of the attorney general:]

"To exercise supervisory powers over county attorneys in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business intrusted to their charge."

Section 4819, R. C. M., 1935, provides for the general duties of the county attorney. Paragraph 6 of said section provides that the county attorney shall, "Give when required, and without fee, his opinion in writing to the county, district, and township officers, on matters relating to the duties of their respective offices."

Paragraph 8 of said section provides that the county attorney must,

"when ordered or directed by the attorney general so to do, to promptly institute and diligently prosecute in the proper court, and in the name of the State of Montana, any criminal or civil action or special proceeding, it being hereby declared that the supervisory powers granted to the attorney general by Section 199 (5) of these codes, include the power to order and direct said county attorneys in all matters pertaining to the duties of their offices."

The statute places the responsibility of legal matters of the counties upon the county attorney, and not upon the other county officials, and it necessarily follows that it is the duty of the county officials to be guided by his advice upon such matters. As the law authorizes the attorney general to exercise

supervisory control over the county attorney, it follows that if the attorney general issues an opinion in conflict with that of the county attorney, the latter's opinion has been superseded, in the same manner as a judgment of the district court is superseded by the final judgment of the supreme court. In the absence of a contrary court judgment, if the county attorney's opinion has been superseded, the only rule of law remaining for the county officials to follow would be that rule as enunciated in the opinion of the attorney general, and such opinion would constitute the law.

In the case of *State v. District Court*, 22 Montana 25, at page 27, the court said:

"A duty to exercise supervisory power clearly implies the possession of supervisory power. There is, therefore, in the Attorney General a right to oversee for direction, to inspect with an authority all matters pertaining to the duties of the county attorneys of the State, and to direct with superintending oversight the official conduct and acts of such officials; and it is his prescribed duty to exercise and perform these acts, and to do whatever may be necessary and proper to render his power in these respects effective. Duty to exercise general supervisory power over county attorneys would not, however, necessarily carry with it a duty to actively assist a county attorney in the discharge of his duties, for supervision might be exerted without actual assistance. Thus, in the preparation of an important argument, the Attorney General might, under the power of supervision, communicate by letter with a county attorney, directing the pleadings to be relied on, or the line of argument to be pursued, and the general conduct of the trial, even though such course conflict with the county attorney's wishes; yet be absent throughout the whole proceedings so conducted under his supervision. In this single clause of the statute, therefore, we do not find a duty detailed to the Attorney General to personally actually assist a county attorney in the performance of the latter's duties. Proceeding, evidently, with this view of what are the Attorney General's **supervisory** powers over county attorneys, the Legislature

stepped further, and, guided by the public interests, announced by another special clause of the statute cited, as one of the Attorney General's duties, that he shall, 'when required by the public service, or directed by the Governor, to assist the county attorney of any county in the discharge of his duties.' Here we have a specific direction by which the Attorney General is to do more than to exercise those supervisory powers contemplated by previous requirements of the law—he is to assist the county attorney in the discharge of his duties when the public service requires it, or when the Governor directs him to give such assistance. This assistance is to be actual, and, by fair contemplation of the statute, should be by the presence and participation of the Attorney General, if his presence may be had. The supervisory power, heretofore discussed, always vests in the Attorney General, and accompanies him wherever he may go in the discharge of his duties; but under subdivision 7, quoted, superadded to the duty of supervision is that of actual assistance to be rendered whenever the contingencies referred to in the section have arisen. Nor is there any limit whatever to the assistance to be given—no point where it is to begin or to end, except the bound of the official duty of the county attorney. Just so long as the county attorney has a duty to discharge, and just so far as he may go in discharging it, so long is it the right and obligation of the Attorney General to actively assist him in the discharge of such a duty; and equally far in executing the duty shall he go when the public service requires it, or when directed to assist by the Governor.

"The policy of the law is easily discerned. The Attorney General is the principal law officer of the State. His duties are general; his authority is co-extensive with public legal affairs of the whole community. His advice often affects the rights of all persons within the State, and, excepting judgments and orders of court, his opinions control public interests more largely than do the acts of any other official of the State. Responsibilities of so high a character are usually put upon a lawyer of ability, experience and character, and, pre-

suming the Attorney General to be such, the statute has given him the significant, yet extensive, powers referred to. Again, exigent times occasionally arise in the affairs of a state, where local considerations render it impolitic to intrust a county attorney with the discharge of his duty unaided by learned counsel representing the supreme authority of the State. Circumstances sometimes demand that there shall not only be a supervisory action, but an assistance to an inferior official as well, to the end that justice may be more certainly attained. When consideration of this nature move the Attorney General, or, even when they do not move him, yet the Governor is moved by them, and directs him to exert his authority, he shall assist the county attorney, and must do so in the discharge of the duties which the county attorney is required by law to perform."

If the county officials fail and refuse to follow the opinion of the Attorney General, where no judicial decision has been promulgated, it will be impossible in a great many instances to establish a uniform administration of the law throughout all the counties of the state, and in order for property and persons to receive the equal benefits and perform equal obligations, under the laws, it is necessary to have a uniform administration of those laws. This situation is aptly illustrated in the administration of your own department, the Department of Public Welfare, and in the county departments of Public Welfare, where the federal government has required as a condition to federal grants in aid and public assistance, in the State of Montana, that the act shall be placed in uniform operation throughout all of the counties of the state. If different counties take different views, and different county attorneys render different opinions upon this particular law, a chaotic condition may arise, and the law could not be administered uniformly, and the state would be deprived of considerable money from the federal government.

If the county officials do not follow the Attorney General's opinion, they must assume the responsibility for the consequences of their acts, and particularly in that class of cases where good faith is involved, and such re-

sponsibility may include, in some instances, personal liability. If the county officials follow said opinion, and even though the opinion proves erroneous, generally they are safeguarded against the consequences.

Therefore, it is my opinion that the law provides that the various state officials and departments, including your department, and the county officials, shall be guided by the opinions rendered by the Attorney General, until the same are reversed or modified by judicial decision.