

Opinion No. 75**County Attorney—Mileage Expenses To Be Paid By the County.**

Held: 1. Mileage expenses incurred by the County Attorney in preparing for the defense of an action in which the State is beneficially interested are a legitimate charge for which the County is liable. The fact that the trip takes the County Attorney out of the County does not affect the liability of the County.

December 5th, 1949.

Mr. W. J. Traynor
County Attorney
Daniels County
Scobey, Montana

Dear Mr. Traynor:

You have requested my opinion as to whether a County Attorney is entitled to mileage expenses for a trip to another County, which trip is taken for the purpose of preparing to defend an action in which the State is beneficially interested. The purpose of the trip was to discuss with a County Attorney, who was handling a similar action, the method of handling a similar action.

If a County Attorney or other official incurs mileage expenses in the performance of his official duties, he is entitled to payment for these expenses. Section 4884.1 of the Revised Codes of Montana, 1935, as amended by Chapter 93, Laws of 1949, makes provision for payment of the mileage claims.

When the State is beneficially interested in an action it is the duty of the County Attorney to defend such an action. Sub-division 1 of Section 4819, Revised Codes of Montana, 1935 states:

"4819. Duties of the County Attorney. The County Attorney is the public prosecutor and must: 1. Attend the District Court and conduct, on behalf of the State, all prosecutions for public

offenses and represent the State in all matters and proceedings to which it is a party, or in which it may be beneficially interested, at all times and in places within the limits of his County."

The County Attorney's duties are clearly set out in this statute. If the State is beneficially interested in an action then it is the duty of the County Attorney to protect the State's interest.

The charges, that the County is obligated to pay, are set out in Section 4952 of the Revised Codes of Montana, 1935. Sub-division 8 of this Section provides: "The contingent expenses necessarily incurred for the use and benefit of the County."

Under this Sub-division the Montana Supreme Court has held in the case of *In re Claims of Hyde*, 73 Mont. 363, 236 Pac. 248, that this Sub-division includes the necessary expenses incurred by the County Attorney in the performance of his duty. Clearly, the "the benefit" that Section 4952, supra Sub-division 8 provides as a County charge would include the defense of an action in which the State is beneficially interested.

In the case of *In re Claims of Hyde*, supra, the court said in part:

"Under the authorities, and in reason, we are of the opinion that the County Attorney has the power and authority to bind the County . . . if such services were necessary to the proper discharge of his duties as such officer."

Thus, the question as to what is a proper expense depends largely upon whether the expense is necessary in order to carry out his official duties properly.

The Court in *In re Claims of Hyde*, supra, is also clear on the question as to who decides whether the expense is a necessity. It continues:

"The right to recover from the County depends not only upon the authority of the County Attorney to incur the liability against the County, but also upon the necessity for incurring the expense, in connection with the criminal cases or "contingent expenses incurred for the use and benefit of the County." The necessity is, primarily, to be determined by the County Attorney, but his determination is subject to review by the Board when it takes up the claim for allowance or disallowance, under the authority vested in it by Section 4463."

At the time *In re Claims of Hyde*, supra, was decided Section 4465 of the Revised Codes of 1921, contained all of the powers of the County Commissioners and it consisted of twenty-seven sub-divisions. In the Revised Codes of Montana, 1935, these sub-divisions were re-numbered Sections 4465 to 4465.29. Under 4465.11, supra, it is provided:

"Accounts to be Examined, Settled and Allowed. The Board of County Commissioners has jurisdiction and power under such

limitations and restrictions as are provided by law: At the regular meetings of the Board to examine, settle, and allow the accounts legally chargeable against the County except salaries of officers and order warrants to be drawn on the County Treasurer therefor, and provide for the issuing of the same."

The mere fact that the trip takes the County Attorney out of the County does not release the County from liability for payment of the expenses. The liability, as pointed out in *In re Claims of Hyde*, is predicated upon the necessity for the trip. In reviewing, this is the yardstick the County commissioners must apply to the expenses.

It is my opinion that the expenses incurred by the County Attorney in traveling to another County in order to prepare himself for the defense of an action in which the State is beneficially interested is a legitimate expense which the County is required to pay. The necessity for the trip is to be determined by the County Attorney but this is subject to review by the County Commissioners under the authority granted them in Section 4465.11, *supra*.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.