

Opinion No. 10**Nepotism—Appointment of Assistants
—Powers of Board of County
Commissioners—Stenographer To
County Attorney**

Held: (1) The board of county commissioners, while having the power to authorize the appointment of a stenographer in the office of the county attorney when such stenographic service is necessary to properly discharge the duties of that officer does not have the power to make the appointment.

(2) The county attorney only has the power to appoint a stenographer to work in his office. Hence, the Section 59-519, R. C. M., 1947, known as the Nepotism Law, prohibits the county attorney from appointing his wife as a stenographer as they are related within the first degree of affinity.

(3) If the board of county commissioners had the power to appoint assistants to other county officers, it could appoint a relative of that officer to the position as the Nepotism Law only applies to the appointing power. However, such action on the part of a board of county commissioners would have to be independent of any agreement or promise entered into between the board and other county office.

March 28, 1951.

Mr. G. E. Monkman, Clerk
Board of County Commissioners
Teton County
Choteau, Montana

Dear Mr. Monkman:

You have written to me on behalf of the board of county commissioners of Teton County and requested my opinion on a problem that has arisen in your county. You state that competent stenographic help is not available in your county and that the wife of the County Attorney is available for part time work in the office of the County Attorney. You are aware that the County Attorney may not appoint his wife to the position himself without violating Sections 59-518 and 59-519, R. C. M., 1947, known as the nepotism statutes. You inquire whether the Board of County Commissioners has the power to make appointment of stenographers in county offices other than in the Commissioners office and if they have such power whether the Board could appoint the wife of the County Attorney as stenographer to the County Attorney without violating the Nepotism law.

The only direct authority given by statute to the county attorney to employ a stenographer is found in Section 94-6111, R. C. M., 1947. This statute requires that the testimony of witnesses

in homicide cases is to be reduced to writing by a stenographer appointed by the county attorney, but this authority is clearly restricted by the subject matter of the section. In *Re Claims of Hyde*, 73 Mont. 363. I have been unable to find any other statute dealing with the power of the county attorney to employ a stenographer. In the case of *In re Claims of Hyde*, supra., the County Attorney of Mineral County employed a stenographer and the Board of County Commissioners refused to allow the claim of the stenographer for the services rendered. The stenographer brought suit to recover the amount of the claim presented by her to the Board of County Commissioners. The question raised in the suit was whether the county attorney had the authority to employ a stenographer in view of the direct withholding of authority in that regard by the county commissioners.

The Montana Supreme Court recognized that it was necessary to find some statutory provision clothing the county attorney with such authority, either directly or by necessary implication. Since no direct statutory authority existed, except in the specific case provided for by Section 94-6111, supra, the Court then considered whether such authority was necessarily implied from other statutory provisions. The Court recognized also that a stenographer was in no sense a deputy, but since Section 16-3802 R. C. M., 1947, provides that "the contingent expenses necessarily incurred for the use and benefit of the county are county charges", the Court held that the county attorney had the power and authority to bind the county for services of a stenographer if such services were necessary to the proper discharge of his duties as such officer. However, the Court recognized that whether the expense of a stenographer was necessary was a question of fact to be determined primarily by the county attorney, but nevertheless subject to review by the board of county commissioners under the authority vested in the board by Section 16-1001, R. C. M., 1947.

The case of *In re Claims of Hyde*, supra, having established that the County Attorney may employ a stenographer if such services are necessary, the question still remains does the Board of County Commissioners have

the authority to employ a stenographer independently of the wishes of the County Attorney. Again, if such authority exists it must be found directly from a specific statute, or by necessary implication from some statutory provision. I am unable to find a specific statute granting such authority to the board.

Section 16-3704, R. C. M., 1947, provides that the board of county commissioners is authorized to allow the several county officers to appoint a greater number of deputies than the maximum number allowed by law when, in the judgment of the board such greater number of deputies is needed for the faithful and prompt discharge of the duties of any county office. A former opinion of an Attorney General held that while a stenographer was not a deputy county attorney that nevertheless Section 16-3704 gave the board of county commissioners the implied power to authorize the county attorney to employ a full time stenographer if such services were necessary. See Vol. 3, Official Opinions of the Attorney General at page 65. However, I believe the wording of Section 16-3704, supra, is important for it will be noted that the board is only authorized to allow the officer to appoint additional deputies and does not give the board the authority to make the appointment itself.

Further, Section 59-402, R. C. M., 1947, provides as follows:

"All assistants, deputies, and other subordinate officers, whose appointments are not otherwise provided for, must be appointed by the officer or body to whom they are respectively subordinate."

This section has been the law of Montana since 1895 when it was enacted as Section 9991 of the Political Code of 1895. The question then arises is a stenographer to the county attorney an assistant, deputy or other subordinate officer within the purview of Section 59-402? The question is not easily answered since we have already seen that the Legislature never specifically authorized the County Attorney to employ a full time stenographer, but the power to do so has been held to be necessarily implied from other statutory provisions. In re Claims of Hyde, supra. Further, the status of deputies

in the office of the county attorney is different from that of deputies in the other county offices because the deputies must be lawyers duly admitted to practice law by the Montana Supreme Court before they can appear before the Supreme or District Courts, Section 93-2008, R. C. M., 1947. It being established that a stenographer is in no sense a deputy county attorney, the question then arises is a stenographer an "assistant" within the meaning of Section 59-402, supra.

In enacting Section 59-402, supra, the Legislature used both the words "deputy" and "assistant" and it must be presumed under the normal rules of statutory construction that the Legislature meant the two words to have different meanings, although to be sure the two words are often used interchangeably in common parlance. 43 Am. Jur. 218 states the general rule that the two words are not legally synonymous, as a "deputy" is an agent who is sworn and empowered to act in place of his principal, while an "assistant" is not required to be sworn, and usually does only clerical or ministerial acts. In view of this well established legal distinction between the two terms, it is my opinion that a stenographer may properly be denominated an assistant. Thus, the provisions of Section 59-402, in my opinion, make it mandatory that a stenographer to the county attorney must be appointed by the county attorney, as it is that officer to whom the stenographer is directly subordinate.

The Board of County Commissioners has the power to authorize the appointment of a stenographer to the county attorney if the board decides that such services are necessary to properly discharge the duties of the office. However, once the question of necessity has been decided and the authorization to appoint given, the power of the board of county commissioners ends, and the power to make the appointment rests solely with the county attorney. Therefore, the wife of the county attorney may not be employed to act as a part time stenographer to the county attorney as the nepotism statutes preclude the county attorney from making the appointment as the wife is related to him within the first degree of affinity. State ex rel. Hoagland v. School District No. 13 of Prairie County, 116 Mont. 294, 298, 151 Pac (2nd) 168.

The first of your two questions being answered in the negative an answer to your second question is unnecessary. However, it is well established that if the board of county commissioners had to power to make the appointment that it could do so without violating the nepotism statutes unless it entered into an agreement or promise with the county attorney to employ the wife of the county attorney. The Montana Supreme Court in the case of *State ex rel. Kurth et al. v. Grinde et al.* 96 Mont. 608, 613, 32 Pac (2nd) 15 has held that the nepotism statute, 59-519, only applies to the appointing power.

I am aware that the County Attorney would prefer to employ someone other than his wife but that competent stenographic service is not available at the salary that can be paid by the county. This is indeed regrettable and maybe the solution to the problem would be to provide more funds to pay for such services when the next county budget is made up.

In conclusion, it is my opinion that:

(1) The board of county commissioners, while having the power to authorize the appointment of a stenographer in the office of the county attorney when such stenographic service is necessary to properly discharge the duties of that officer, does not have the power to make the appointment.

(2) The county attorney only has the power to appoint a stenographer to work in his office. Hence, the Section 59-519, R. C. M., 1947, known as the Nepotism Law, prohibits the county attorney from appointing his wife as a stenographer as they are related within the first degree of affinity.

(3) If the board of county commissioners had the power to appoint assistants to other county officers, it could appoint a relative of that officer to the position as the Nepotism Law only applies to the appointing power. However, such action on the part of a board of county commissioners would have to be independent of any agreement or promise entered into between the board and other county office.

Very truly yours,
ARNOLD H. OLSEN
Attorney General