

Opinion No. 94.

Counties — Special Counsel, Employment of—County Attorney, Powers of—Boards of County Commissioners, Powers of.

HELD: A county attorney does not have the power to employ special counsel unless specifically authorized to do so by the board of county commissioners as provided in Section 16-1126, R. C. M., 1947.

September 23, 1954.

Mr. Robert J. Webb
County Attorney
Madison County
Virginia City, Montana

Dear Mr. Webb:

You have requested my opinion upon the following question:

“May the county attorney bind the county to a contract for additional counsel in the trial of a criminal action without the consent of the board of county commissioners, whether or not they have knowledge of the arrangement.”

Two statutes control the hiring by counties of additional counsel. These are Sections 16-1017 and 16-1126, R. C. M., 1947, which provide in part, as follows:

"16-1017. Direction of Law Suits. The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To direct and control the prosecution and defense of all suits to which the county is a party.

"16-1126. Special Counsel—Acting County Attorney. The board of county commissioners has the power, except in counties of the first class, whenever, in its judgment, the ends of justice or the interests of the county require it, to employ, or authorize the county attorney to employ, special counsel to assist in the prosecution of any criminal case pending in such county, or to represent said county in any civil action in which such county is a party . . ."

These sections place the direction and control of law suits, including the matter of hiring additional counsel, in the hands of the board of county commissioners.

The power of appointing special counsel to represent the county is an extraordinary power, the exercise of which has always been narrowly construed. (See *Territory v. Harding*, 6 Mont. 323.) The power of the county commissioners in appointing special counsel was the subject of an Attorney General's opinion by Attorney General Foot, 12 Opinions of the Attorney General 181, in which it was held that the board of county commissioners has only such authority in this field as is delegated to them by statute. (See also *Porter v. District Court*, 124 Mont. 249, 220 Pac. (2d) 1035.)

The existence and exercise of this power is limited to those cases where it exists specifically, by statute, or by necessary implication from the powers of the district courts, as in *Territory v. Harding*, supra, and it cannot exist in other cases. Since the County Attorney is nowhere authorized specifically to employ special counsel to assist him in the prosecution of law suits, the power, if it exists, must exist by necessary implication from the duties of his office. However, the powers of the County Attorney in employing deputies and office help have also previously been quite clearly defined. In 15 Opinions of the Attorney General 53, No. 67, the powers of the County

Attorney to hire extra investigators was questioned. Attorney General Nagle said:

"As a rule the county commissioners must authorize the employment of all extra employees before they can claim compensation from the county and after such employment is authorized by the board of county commissioners, the official who desires the extra help may choose his employee. The only exception to this rule is in emergencies, where such emergency will not permit of the delay necessary for the board to assemble."

Since Section 16-1126, R. C. M., 1947, provides only that the County Attorney may employ other counsel upon the authorization of the County Commissioners, it is evident that this is the full extent of the power and such authorization is necessary.

This opinion does not consider and is not intended as a ruling upon the merits of the claim or of any claim which might be filed in such a case. Whether or not a contract for services by the commissioners and the special counsel may be implied from the facts of the situation is a question of fact which cannot be settled by this office.

It is, therefore, my opinion that the County Attorney does not have the power to employ special counsel unless specifically authorized to do so by the Board of County Commissioners as provided in Section 16-1126, R. C. M., 1947.