

the Board of County Commissioners may retain counsel for their defense, the expense therefor to be borne by the county.

December 30, 1955

Mr. Chester L. Jones
County Attorney
Madison County
Virginia City, Montana

Dear Mr. Jones:

You have requested my opinion as to whether it is the duty of the County Attorney to appear and defend the county commissioners when they have been sued in their individual capacity for damages resulting from an election contest. You ask the further question whether the commissioners may employ special counsel at county expense to defend them in the event the County Attorney does not act.

You have stated that certain county commissioners acting in their official capacity by order of the court conducted a recount of ballots cast in the 1954 elections. During the recount certain ballots were disregarded changing the presumed winner of the sheriff's office in your county. At a subsequent election contest, the presumed loser of the election was declared the winner as a result of tampered ballots and through the use of original tally books. The winner of the contest brought this action against the county commissioners and others in their individual capacity.

The Board of County Commissioners is charged by law with the duty of conducting the recount.

Section 23-1801, R.C.M., 1947, states in part:

"The board of county commissioners of each county is ex-officio a board of county canvassers for the county, . . ."

Section 23-2301, R.C.M., 1947, states in part:

"Any unsuccessful candidate for any public office at any general or special election, or at any municipal election, may within five days after the canvass of the election

Opinion No. 52

**Board of County Commissioners —
County Attorney — Duty To
Defend**

HELD: It is the duty of the County Attorney to defend the Board of County Commissioners in actions brought against them for the performance of their official functions. Further, if the County Attorney is unable to serve as counsel or is in any way disqualified to serve,

returns by the board or body charged by law with the duty of canvassing such election returns, apply to the district court of the county in which said election is held, or to any judge thereof, for an order directed to such board to make a recount of the votes cast at such election, in any or all of the election precincts wherein the election was held, as herein-after provided . . . the court or judge shall make an order addressed to the said board of county canvassers, requiring them at the time and place fixed by said order, which time shall be not more than five days from the making of such order to reassemble and reconvene as a canvassing board, and to recount the ballots cast at said election precinct or precincts of which complaint is made as in said order specified."

The question then arises, is it the duty of the County Attorney to defend the Board charged by law to conduct the recount when the members of that Board are the individual defendants in a damage action alleging fraud and conspiracy in the recount?

The precise question has not been litigated. Generally speaking the County Attorney must defend all actions in which the state or county is beneficially interested. The defendants in the action referred to are defendants by virtue of the fact that, by law, it was their duty, as county commissioners, to conduct a recount of the ballots cast for sheriff in the 1954 election. It is in the interest of the county and its citizens that the commissioners perform their legal duties. It is only by the performance of this duty that the commissioners have subjected themselves to this suit.

It is therefore my opinion that the County Attorney should defend the Board of County Commissioners in actions brought against them for the performance of their official functions.

It is further my opinion that if the County Attorney is unable to serve as counsel or is in any way dis-

qualified to serve, then the Board of County Commissioners may retain counsel for their defense, the expense therefor to be borne by the county.

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