

**Opinion No. 12**

**SCHOOLS AND SCHOOL DISTRICTS; Board of Trustees, Legal advice, special counsel; SCHOOLS AND SCHOOL DISTRICTS; Board of Trustees, Powers, E m p l o y m e n t of special counsel; SCHOOLS AND SCHOOL DISTRICTS; Budget, appropriation for legal services not authorized; COUNTIES; Attorney for school districts; COUNTY ATTORNEY; Duties, Actions, to represent school districts. Sections 16-3104, 75-1714, 75-1715, 75-1803 and 75-4708, Revised Codes of Montana, 1947.**

**HELD: A school district has no authority to employ special counsel, as it is a county obligation to provide legal services for the school districts.**

---

July 23, 1963

Mr. Henry I. Grant, Jr.  
County Attorney  
Stillwater County  
Columbus, Montana

Dear Mr. Grant:

You have requested my opinion on the following questions:

1. May a school district employ private counsel to represent the district?
2. If a school district has such power, how are counsel fees paid?

It has long been the law in this jurisdiction that school districts are public corporations, **McNair v. School District No. 1 of Cascade County**, (1930) 87 Mont. 423, 425, 288 Pac. 188; and as such, possess only those powers which the legislature has conferred upon them, **Finley v. School District No. 1**, (1915) 51 Mont. 411, 414, 153 Pac. 1010. The powers of the district are exercised by its board of trustees who may perform only such acts as are authorized by law, either expressly or by necessary implication. A statute which grants certain powers to the district must also be regarded as a limitation upon the powers so granted, **Abshire v. School Dist. No. 1 of Silver Bow County**, (1950) 124 Mont. 244, 247, 220 P. 2d 1058. With this principle in mind, we must consider the meaning of Section 75-1803, R.C.M., 1947, which grants school districts the following powers:

“Every school district constituted and formed as provided in these codes shall be and is hereby declared to be a body corporate, and under its own proper name or number as such corporate body **may sue and be sued**, contract and be contracted with, and may acquire, purchase, and hold and use personal or real property for school purposes mentioned in these codes, and sell and dispose of the same.” (Emphasis added.)

As school districts have the authority to “sue and be sued”, it is evident that they have the right to be represented by legal counsel; the right to be represented by legal counsel is a necessary implication of the authority granted by the Legislature.

The legislature has further provided, however, that the county attorney is the school district's legal counsel. Section 75-4708, R.C.M., 1947, provides:

“The county attorney shall be the legal adviser of the county superintendent and all school trustees, and shall prosecute and defend all suits to which a district may be a party.”

When a school district is a party to a legal proceeding, the district will be represented by the county attorney and there is no provision in the law which would authorize the employment of any other counsel for that purpose. A problem is presented when the county attorney is unable to represent the school district because of either a personal or statutory disability. To that problem this opinion is directed.

County attorney's, like all attorneys, are governed by the rules of professional ethics. Canon Number 6, of the **Canons of Professional Ethics**, provides in part:

“\* \* \* It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

“The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.”

Thus, an attorney may advise his client to pursue a course of action which would be adverse to a school district and before such action was concluded the attorney may have assumed the office of county attorney. In this situation the county attorney should not represent the school district in an action which he had instituted for his former client. Moreover, the county attorney could not represent his former client because of the statutory disqualification imposed by Section 16-3104, R.C.M., 1947, which provides:

“The county attorney, except for his own services, must not present any claim, account, or other demand for allowance against the county, nor in any way advocate the relief asked on the claim or demand made by another.”

It is entirely possible then, that a county attorney may be disqualified from performing his duties by reasons of health, legal

ethics or law. Under such circumstances, can the school district employ private counsel to perform the duties of the county attorney?

This question has been considered on several occasions by former Attorneys General and their opinions have been conflicting, Reports and Official Opinions of Attorney General: Volume 11, page 124 (1925); Volume 11, page 247 (1926); Volume 14, page 181, 184 (1931); Volume 15, page 234, 235 (1933); Volume 17, page 237, 238 (1937). The last cited opinion, although not concerned with the question of the employment of counsel by a school district, did hold:

“Mileage expenses incurred by the county attorney in the performance of his duties on behalf of school districts must be borne by the county.”

In that opinion it was pointed out that the expense for legal services is a county expense rather than the expense of the political subdivision for which the service was performed. The opinion discusses the duties of the county attorney and then states:

“For all these duties outside his obligations directly to the county, he receives no additional compensation, and must perform them as part of his office. In other words, the county is merely a convenient subdivision for dividing up the legal problems of the state, and the county attorney is placed therein as a composite officer, taking care of all the problems that arise within that particular subdivision. He is attorney for all of them, but receives his salary from the county and the state only.

“While the state, by the Constitution, pays one-half the salary, the burden of paying the legitimate expenses incurred by the county attorney falls on the county. This is true when he is acting on strictly county business and equally true when he is on business for some of the political subdivisions within the county. In incurring mileage expense on behalf of a school district, the county attorney would be required to submit his claim to the county commissioners, who would determine if this were a necessary and valid claim, as provided by section 4465.11 [16-1014, R.C.M., 1947]. If it is determined that such a

trip was necessary, then it would be a proper charge against the county and should be paid in accordance with sections 4884 and 4884.1 [59-801 and 59-802, R.C.M., 1947].

There is no reason why a distinction should be made between the expense involved in obtaining legal services and the expense of the legal service. The county is just as obligated to pay for the legal services, of a school district, as it is to pay for the costs incurred in making such services available to the school district. The county attorney is not authorized to employ special counsel to perform his duties, Report and Official Opinions of Attorney General (1954) Volume 25, Opinion No. 94, page 152, which 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.”

As the county is obligated to provide legal services to school districts, and as the only body which is authorized to employ special counsel for the county is the board of county commissioners it is evident that a school district must apply to that board for the authorization to employ special counsel in the event that the county attorney is unable to represent the school district.

This conclusion is supported further by school budget laws. The purposes for which school taxes may be levied and the expenditure of such funds after they have been collected, is strictly limited by the school budget laws. The school budget law, Title 75, Chapter 17, Revised Codes of Montana, 1947, does not contemplate the levy of school taxes for the payment of legal expenses. Furthermore, the expenditure of school funds can only be made pursuant to the purpose for which the funds were raised, as Section 75-1714, R.C.M., 1947, provides in part:

“\* \* \* the board of school trustees and all officers and employees of such district shall be limited in the making of expenditures or incurring of liabilities to the amount of such detailed appropriations, respectively; provided that transfers may be made from the appropriation of one (1) item to the appropriation for any other item, as hereinafter provided; ex-

penditures made, liabilities incurred or warrants issued in excess of any of the final budget detailed appropriations, as originally determined, or as revised by transfer, as hereinafter provided, shall not be a liability of the district and no money of the district shall ever be used for the purpose of paying the same.”

Section 75-1715, R.C.M., 1947, provides that transfers may be made among appropriations, but there is no provision for the transfer of monies from an appropriated item to an item that was not appropriated for. Our Supreme Court, in considering the school budget law, **State ex rel. McHose v. District Court** (1933) 95 Mont. 230, 234, 26 P. 2d 345, said:

“It is clear from this and succeeding sections of the Act that each item in the budget constitutes an appropriation for a definite and specific object or purpose, and that the amount appropriated for one object or purpose may not be used or paid out for another, except that section 15 [75-1715] makes provision for the transfer of a part of the appropriation from one item to another, but this can be done only when it appears that there is an excess appropriation for one item and a deficiency in another.

“Unless we find other provisions of the Act leading to a different conclusion, Chapter 146, Laws of 1931, clearly works an implied repeal of section 1017, Revised Codes 1921 [75-1638], for as thus far considered the provision of the Act in effect prohibit the payment of claims not included in the budget and for which no appropriation was made. In other words, the money on hand to the credit of the district, having been raised for a specific purpose, may not be used for a wholly different purpose. If the provisions of Chapter 146 thus far considered are given application, they conflict with section 1017. Chapter 146, being a later date than section 1017, works a repeal of section 1017, unless section 16 of the Act [75-1716] compels a different conclusion.”

Thus a school district cannot pay counsel fees unless it has budgeted for such expense, and as the budget law does not authorize the budgeting of such expense, a school district is unable to pay counsel fees.

In answer to your inquiries it is my opinion that: A school district has no authority to employ special counsel, as it is the obligation of the county to provide legal services to the school districts.

Very truly yours,  
FORREST H. ANDERSON  
Attorney General