

VOLUME NO. 37

OPINION NO. 63

ATTORNEYS - Fees for county attorney in addition to salary;
COUNTIES - Fees for county attorney in addition to salary;
COUNTY OFFICERS AND EMPLOYESS - Fees in addition to salary;
FEES - Compensation of county attorney; PUBLIC OFFICERS -
Fees in addition to salary; TAXATION AND REVENUE - Compensa-
tion of county attorney for county's intervention in tax
appeal; REVISED CODES OF MONTANA, 1947 - Sections 16-
3101(3), 84-210, 84-301, 84-709.1, 84-4502.

HELD: A county attorney may not accept a fee from the
county commissioners, in addition to his or her
salary as county attorney, for prosecuting an
appeal from a decision of the tax appeal board in
which the county has intervned as party plain-
tiff.

12 September 1977

John S. Forsythe, Esq.
Rosebud County Attorney
Rosebud County Courthouse
Forsyth, Montana 59327

Dear Mr. Forsythe:

You have asked my opinion on the following question:

May I legally accept a fee from the county commis-
sioners in addition to my salary as county
attorney, for prosecuting an appeal from a
decision of the tax appeal board in which the
county has intervned as a party plaintiff?

Your question has never been directly answered by the
Montana Supreme Court. The general rule is stated in 1 J.
Dillon, Municipal Corporations, § 426, at 739 (5th ed. 1911)
(footnote omitted):

It is a well-settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of those duties, even though the salary may be a very inadequate remuneration.... The rule... should be rigidly enforced. The statutes of the legislature... seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse.

Cases have arisen involving express contracts for the performance of additional work at extra compensation. Those cases have generally held:

If the extra services which the officer undertakes to perform at an agreed extra compensation are a part of or germane to the official duties of his office or are merely incidental to those duties, the existence of an express contract for additional compensation does not prevent the operation of the rule ... that he is not entitled to extra compensation for extra services rendered by him. In such case the contract for additional compensation is invalid as against public policy.

Annot., 159 A.L.R. 606, 607-608 (1945).

If the services are outside the scope of official duty and expressly contracted for, there are two lines of authority, one upholding, and the other denying the validity of the contract. Id. at 608. Montana upholds the validity of such contracts. Anderson v. Hinman, 138 Mont. 397, 412, 357 P.2d 895, 903 (1960). See also State v. Hale, 129 Mont. 449, 461, 291 P.2d 229, 235 (1955).

The answer to your question therefore turns on whether your prosecuting the tax appeal on behalf of Rosebud County is incidental to or outside of your statutory duty as county attorney.

Section 16-3101(3), R.C.M. 1947, says that a county attorney has a duty, inter alia, to:

Draw all indictments and informations, defend all suits brought against the state or his county, prosecute all recognizances forfeited in the courts of record, and all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county...

The provision does not specifically require a county attorney to represent the county that intervenes as a party plaintiff. However, my opinion is that the function you are performing which prompted this opinion request is covered by the provision.

The facts as I understand them are these: The State Department of Revenue classified a county taxpayer's property as class four. The taxpayer paid under protest, contending that the property should have been classified as class seven, or new industrial property. Section 84-301, R.C.M. 1947. The taxpayer appealed the classification to the state tax appeal board. That board agreed with the taxpayer, and the Department of Revenue sought judicial review of the decision in district court under section 84-709.1, R.C.M. 1947. Rosebud County, which had not been a party to the prior proceedings, then intervened under Rule 24(b), M.R. Civ.P., asking that the department's position be upheld.

Rather than seek administrative review of the classification by the tax appeal board, the taxpayer could have brought "an action in any court of competent jurisdiction against the officers to whom said license or tax was paid, or against the county...in whose behalf the same was collected, and the state department of revenue...to recover such tax or license, or any portion thereof, paid under protest..." section 84-4502, R.C.M. 1947 (emphasis added). Had the taxpayer brought such an action, the county's defense would clearly have been the duty of the county attorney. "The county attorney...must...defend all suits brought against... his county..." Section 16-3101(3), R.C.M. 1947.

Rather than pay the tax under protest, the taxpayer might also have refused payment, in which case the county's interest would have been represented by an action for payment of the tax. Again, the prosecution of that action would clearly have been the county attorney's duty. Sections 16-3101(3) and 84-210, R.C.M. 1947. The Montana

Supreme Court has said that "the county attorney, in his official capacity,...is authorized to prosecute and defend actions on behalf of...the county, in the name of the county, for the amounts of taxes due the...county." Carlson v. Flathead County, 130 Mont. 36, 49; 293 P.2d 279, 285 (1955).

Whether the handling of this action is considered incidental to or outside of the statutory duties of a county attorney should not depend on how the taxpayer chooses to protest the tax. The interest of the county which the county attorney represents is the same regardless of the form that the action takes. The representation of the county, whether as prosecutor, defendant, or intervenor in an action determining protested taxes is the county attorney's duty. You are therefore not entitled to extra compensation for carrying out that duty.

As an elected county attorney you cannot provide special counsel for the county and receive compensation for both jobs. In 1905, Montana's Attorney General said that a board of county commissioners could employ special counsel for the prosecution of a civil case to which the county is a party. 1 OP. ATT'Y. GEN. NO. 190 (1905). However, that opinion did not contemplate the hiring of the regular county attorney as special counsel, referring instead to situations where "the duly elected county attorney is, by reason of physical inability, self-interest, absence, or pressure of official business, unable to attend to the particular case or discharge the particular duty." Id. at 192. Those duties include "looking after the interests of the county in all matters of litigation." Id.

THEREFORE, IT IS MY OPINION:

A county attorney may not accept a fee from the county commissioners, in addition to his or her salary as county attorney, for prosecuting an appeal from a decision of the tax appeal board in which the county has intervened as party plaintiff.

Very truly yours,

MIKE GREELY
Attorney General