

VOLUME NO. 37

OPINION NO. 84

COUNTY ATTORNEYS - Salary, private practice; COUNTY ATTORNEYS - Deputies; COUNTY COMMISSIONERS - Power to increase county attorney's salary; REVISED CODES OF MONTANA, 1947 - Section 25-602, 25-604, 25-605, 25-609.1.

HELD: The county commissioners of a fourth class county which did not adopt a self-government charter have no power to increase the county attorney's statutory salary in exchange for an agreement by such attorney not to engage in private practice.

27 October 1977

Board of County Commissioners  
Park County  
Livingston, Montana 59047

Dear Board Members:

You have requested my opinion on the following questions:

1. May the county commissioners of a fourth class county increase the county attorney's salary in exchange for an agreement by such attorney not to engage in private practice?

2. If such full-time county employment is permitted, would the state reimburse the county as they do now, based on the schedule set forth in section 25-605, R.C.M. 1947?

The salaries of county attorneys are fixed and limited by section 25-605, R.C.M. 1947, which provides in pertinent part as follows:

The total salary paid to...county attorneys... shall be the sum of the salary shown in column A based on population when added to the salary shown in column B based on taxable valuation; provided, however, that...county attorneys shall receive in addition to (such salary), the sum of \$1,200 per year. (Emphasis added.)

Section 25-609.1, R.C.M. 1947, requires the county commissioners to fix the county attorney's salary "in conformity with the appropriate salary schedule pertaining to (that) office."

The duty is mandatory and the county has no power to increase the salary. See Matson v. O'Hern, 104 Mont. 126, 142, 65 P.2d 619 (1937). Similarly, it is against public policy to increase the salary of a county attorney for performing any services imposed upon such public officer by law. 37 OP. ATT'Y GEN NO. 63 (1977). This general proposition, however, has no application to counties which have adopted self-government charters, and such counties may increase the salaries of their county attorneys. 37 OP. ATT'Y GEN. NO. 70 (1977).

Because you may not increase the county attorney's salary, it is unnecessary to answer your second question.

However, short of legislative amendment, there is an alternative you might consider. This would alleviate your problem which is, due to demands placed upon the county attorney by his county and private work, not always available when the commissioners need his advice or services.

The alternative is the employment of a deputy county attorney. Section 16-3706, R.C.M. 1947, states that "[t]he whole number of deputies allowed the county attorney in counties of the first and second class must not exceed one chief deputy, and one deputy; and in all other counties such

deputies as may be allowed by the board of county commissioners, not to exceed one chief deputy and one deputy. (Emphasis added.)

You have the power to fix the deputy's compensation, subject only to the limitation that his salary may not exceed 90% of the county attorney's salary. Section 25-604, R.C.M. 1947. His entire salary would be paid out of the contingent fund as a county obligation. Section 25-602, R.C.M. 1947.

You may employ the deputy for less than a full year, for instance on a month-to-month or contract basis, in which case you must compensate him for the time so employed. Section 25-604, R.C.M. 1947. This alternative offers you wide freedom. A cooperative effort made between you and the county attorney in employing and fixing the duties of such deputy, would assure you available legal counsel in all instances.

THEREFORE, IT IS MY OPINION THAT:

The county commissioners of a fourth class county which has not adopted a self-government charter may not increase the county attorney's statutory salary in exchange for an agreement by such attorney not to engage in private practice.

Very truly yours,

MIKE GREELY  
Attorney General