

COURTS - Justice court's hours of business;
JUSTICES OF THE PEACE - Calling in an acting justice due to absence or disqualification;
JUSTICES OF THE PEACE - Office hours;
MONTANA CODE ANNOTATED - Sections 3-10-102, 3-10-208, 3-10-231, 3-11-203(1)(d);
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 113 (1980).

- HELD: 1. A board of county commissioners may not appoint an acting justice of the peace in advance, to act whenever a justice is sick, disabled, or absent.
2. If the only justice of the peace in a county is disqualified from acting in any action, he must be replaced by a justice from a neighboring county.
3. There is no minimum amount of time that a justice of the peace must be sick, disabled, or absent before an acting justice of the peace may be appointed.
4. A justice court is always open for the transaction of business except on legal holidays and nonjudicial days. However, the office hours that must be kept by a justice of the peace are set by the county commissioners and need not include hours on every day that the justice court is open for the transaction of business.

21 November 1983

John V. Potter, Jr.
Meagher County Attorney
Meagher County Courthouse
White Sulphur Springs MT 59645

Dear Mr. Potter:

You have requested my opinion on the following questions:

1. Whether the Board of County Commissioners can appoint an acting justice of the peace in advance and by resolution.
2. Whether an acting justice of the peace may be appointed in cases where the duly elected justice of the peace is disqualified from acting.
3. Whether there is a specific length of time for which a regular justice of the peace must be absent before the county commissioners can appoint an acting justice of the peace.
4. Whether a justice of the peace must maintain office hours on all days on which his court is open for the transaction of business.

Section 3-10-231, MCA, provides in pertinent part:

Circumstances in which an acting justice called in--by whom. (1) Whenever a justice of the peace is disqualified ... he shall either transfer the action to another justice's court in the same county or call a justice from a neighboring county to preside in his behalf.

(2) Whenever a justice is sick, disabled, or absent and the county commissioners find that there is a delay in the proper administration of justice or the county attorney makes a written request, another justice, if there is

one readily available, or a city judge or some other qualified person shall be called in to hold court for the absent justice until his return.

(3) During the time when a justice of the peace is on vacation or attending a training session, another justice of the peace of the same county shall be authorized to handle matters that otherwise would be handled by the absent justice. When there is no other justice of the peace in the county, the county commissioners shall handle the situation in the same manner as if the justice were sick or absent. [Emphasis added.]

In 38 Op. Att'y Gen. No. 113 (1980), a statute similar to section 3-10-231, MCA, was construed. There the question raised was whether a city judge had the authority to appoint a regular deputy or substitute city judge with power and authority to act in all matters the same as the regular city judge. The opinion concluded that:

Section 3-11-203(1)(d), MCA, authorizes a city judge for a town who has determined that he or she is unable to act for any reason to call in a justice of the peace or a qualified resident of the town to act in his or her place. However, that provision does not authorize the city judge to appoint a regular deputy or substitute a city judge.

Likewise, section 3-10-231, MCA, is very specific about how and when an acting justice of the peace may be appointed and by whom. To appoint an acting justice of the peace in advance and by resolution would have the same effect as that contemplated in the opinion concerning city judges, i.e., the appointment of a regular deputy or substitute city judge. In this respect I find the rationale of Cox v. Allen, 188 Ky. 598, 222 S.W. 932 (1980), persuasive.

To construe the section as the county judge did in this case would result in having two or more county judges in the same county at the same time, but only one of whom was chosen by the people as provided by law. They might

perchance be making contradictory orders concerning the same matter at the same time, and thus not only obstruct the orderly administration of the office, but create endless confusion.

222 S.W. at 934. I conclude that under section 3-10-231, MCA, a written request by the county attorney or a preliminary finding by the county commissioners that there is a delay in the proper administration of justice is a prerequisite to calling in "some other qualified person" to hold court for a justice in cases where he is sick, disabled, or absent. This provision clearly contemplates calling an acting justice of the peace only in cases where some need has been shown.

Section 3-10-231, MCA, sets no time limit by which the county commissioners might find that a delay in the proper administration of justice has occurred or is occurring. Such a determination must be made on a case-by-case basis depending on the particular facts of an individual case.

You have also asked if in counties where there is only one justice of the peace and that justice is disqualified in a given case under section 3-10-231(1), MCA, must he be replaced by a justice from a neighboring county or may he be replaced by "some other qualified person" as is permitted under section 3-10-231(2), MCA. Section 3-10-231(1), MCA, is clear and unambiguous on this point. This statute provides that when a justice of the peace is disqualified "he shall either transfer the action to another justice's court in the same county or call a justice from a neighboring county to preside in his behalf." Where a county has only one justice of the peace, the statute authorizes only one option: calling in a justice from a neighboring county to preside in his behalf.

Your final question concerns an ambiguity created when section 3-10-102, MCA, is read together with section 3-10-208, MCA. Section 3-10-102, MCA, provides: "A justice's court is always open for the transaction of business, except on legal holidays and nonjudicial days." Section 3-10-208, MCA, provides: "In the resolution providing for the salary, the county commissioners shall designate the office hours for each justice's court. Office hours shall be commensurate

with the salary provided." Section 3-10-102, MCA, refers to when a justice court must be open for the transaction of business, i.e., filing of court documents such as complaints and answers. While the court must be open for the transaction of business, there is no specific requirement in the law under section 3-10-208, MCA, that a justice of the peace maintain a minimum number of office hours each day. The county commissioners have authority to designate the office hours for each justice and may do so without any specific statutory limitation.

THEREFORE, IT IS MY OPINION:

1. A board of county commissioners may not appoint an acting justice of the peace in advance, to act whenever a justice is sick, disabled, or absent.
2. If the only justice of the peace in a county is disqualified from acting in any action, he must be replaced by a justice from a neighboring county.
3. There is no minimum amount of time that a justice of the peace must be sick, disabled, or absent before an acting justice of the peace may be appointed.
4. A justice court is always open for the transaction of business except on legal holidays and nonjudicial days. However, the office hours that must be kept by a justice of the peace are set by the county commissioners and need not include hours on every day that the justice court is open for the transaction of business.

Very truly yours,

MIKE GREELY
Attorney General