

ATTORNEYS GENERAL - Effect of declaratory judgment on a previously issued Attorney General's Opinion;  
COUNTY COMMISSIONERS - Lack of authority to provide additional compensation to county clerk and recorder who is an election administrator;  
COUNTY OFFICERS AND EMPLOYEES - Lack of authority for county clerk and recorder to receive additional compensation for acting as election administrator;  
MONTANA CODE ANNOTATED - Sections 2-15-501(7), 27-8-301;  
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 68 (1974), 38 Op. Att'y Gen. No. 112 (1980), 39 Op. Att'y Gen. No. 7 (1981).

- HELD: 1. A board of county commissioners may not provide additional compensation to a county clerk and recorder who is an election administrator in addition to the clerk's statutory salary.
2. A declaratory judgment by a district court does not supersede a previous Attorney General's Opinion where the district court does not explicitly overrule the prior opinion.

8 November 1985

Rae V. Kalbfleisch  
Toole County Attorney  
Toole County Courthouse  
Shelby MT 59474

Dear Mr. Kalbfleisch:

You have requested my opinion on the following questions:

1. Is it permissible for the elected clerk and recorder to receive additional

compensation for services as an election administrator?

2. Does a declaratory judgment by a district court supersede a previous Attorney General's Opinion?

Section 2-15-501(7), MCA, requires the Attorney General to issue opinions

to the legislature or either house thereof, to any state officer, board, or commission, to any county attorney, to the city attorney of any city or town, and to the board of county commissioners of any county of the state when required upon any question of law relating to their respective offices.

The purpose of an Attorney General's Opinion is to assist an official or government body in understanding its rights and obligations under the law. Although Attorney General's Opinions are declaratory of law, the Attorney General is an executive and not a judicial officer. Opinions serve as an executive construction of state law given for the benefit of the executive branch agencies seeking guidance. See 35 Op. Att'y Gen. No. 68 at 164 (1974).

The Opinions of the Attorney General do not have the effect of judicial rulings. Where a question of law is before the court for determination, the Supreme Court has held that an opinion is persuasive and will be upheld by the court if not erroneous and the Legislature has not enacted any statute declaring otherwise. See State ex rel. Barr v. District Court, 108 Mont. 433, 436, 91 P.2d 399, 400 (1930); State v. Schye, 130 Mont. 537, 541, 305 P.2d 350, 353 (1957).

Your question relates to a previous Attorney General's Opinion, which concerned whether an elected county clerk could receive additional compensation for services rendered as an election administrator. I concluded that since public officials could only claim compensation for services rendered where the compensation is provided by law, the county clerk did not have a right to additional compensation. See 39 Op. Att'y Gen. No. 7 at 27 (1981).

In a 1984 declaratory judgment of the Fifth Judicial District, however, the court--without joining the Attorney General or directly addressing his opinion--ruled the opposite. A county clerk was allowed compensation paid to her by the county commission for services rendered as election administrator. Does the declaratory judgment supersede the 1981 opinion?

Section 27-8-301, MCA, pertaining to declaratory judgments, states:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration ....

A previous Attorney General's Opinion held that by the terms of section 27-8-301, MCA, an Attorney General is not bound by a declaratory judgment entered in a cause to which he was not a party. 38 Op. Att'y Gen. No. 112 at 399 (1980).

This opinion concerned whether particular expenditures required of municipal governments by statute may be financed by property taxes levied in addition to the 65-mill all purpose levy. My conclusions were based largely upon the reasoning of prior Attorney General's Opinions even though those opinions conflicted with a district court decision.

Several factors were considered in reaching my decision. One was that the district court did not explicitly overrule the prior opinions, even though the court's analysis was inconsistent with their content. I also questioned the precedential value of district court judgments. Trial court opinions and judgments are not reported in Montana. As these decisions are unavailable for persons doing research on the question decided by the court, they cannot be taken as declaratory of the law except as applied to the parties before the court. Therefore, district court judgments cannot serve as precedent. The opinion also held that a district court judgment in an action to which the Attorney General is not a party is not binding on the Attorney General in the performance of his statutory duty to render advisory opinions. 38 Op. Att'y Gen. No. 112 at 399 (1980).

Section 2-15-501(7), MCA, provides in part:

If an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general's opinion shall be controlling unless overruled by a state district court or the supreme court. [Emphasis added.]

The opinion in the instant issue was not expressly overruled by the declaratory judgment. Although the parties to the issue are bound by the judgment, it is questionable that this judgment can serve as binding precedent for all judicial districts. As chief legal officer and legal advisor, the Attorney General need not be bound by district court declaratory judgments in actions to which he was not a named party and which do not explicitly overrule a previous opinion. Although the district court opinion is entitled to weight, the Attorney General may reach a contrary result in his interpretation. The previous opinion regarding compensation of county clerks, 39 Op. Att'y Gen. No. 7 at 27 (1981), remains valid.

THEREFORE, IT IS MY OPINION:

1. A board of county commissioners may not provide additional compensation to a county clerk and recorder who is an election administrator in addition to the clerk's statutory salary.
2. A declaratory judgment by a district court does not supersede a previous Attorney General's Opinion where the district court does not explicitly overrule the prior opinion.

Very truly yours,

MIKE GREELY  
Attorney General