

VOLUME NO. 41

OPINION NO. 34

ATTORNEYS - Authority of county commissioners to employ private attorney;

ATTORNEYS - Authority of county official to retain defense counsel;
ATTORNEYS GENERAL - Supervisory authority over county attorney;
COUNTIES - Obligation to pay defense-related expenses of county official;
COUNTY ATTORNEYS - Consent for employment of private attorney;
COUNTY COMMISSIONERS - Authority to employ private attorney;
COUNTY OFFICERS AND EMPLOYEES - Authority to retain defense counsel;
MONTANA CODE ANNOTATED - Sections 2-9-101, 2-9-305, 2-15-501(5), 7-4-2707, 7-4-2708, 7-4-2711(1), 7-5-2101, 7-5-2104, 7-6-2323, 37-61-403;
OPINIONS OF THE ATTORNEY GENERAL - 1 Op. Att'y Gen. at 190 (1905), 37 Op. Att'y Gen. No. 63 (1977), 37 Op. Att'y Gen. No. 171 (1978).

- HELD: 1. A county attorney may not unreasonably withhold his consent to the employment of another attorney by the board of county commissioners to perform legal services in connection with the civil business of the county. The decision of a county attorney to withhold his consent is subject to the supervisory authority of the Attorney General.
2. An elected county officer is not required to obtain the consent of the county attorney or the county commissioners in order to retain counsel in defense of a suit brought by the county attorney pursuant to section 7-6-2323, MCA. The county must reimburse the officer for legal fees incurred in the defense of the action unless an exclusion, as provided in section 2-9-305(6), MCA, applies.

8 November 1985

Ed A. Miller, Chairman
Big Horn County Board of Commissioners
P.O. Drawer H
Hardin MT 59034

Dear Mr. Miller:

I have received your letters of September 17 and 18, 1985, requesting my opinion on two issues of concern to the board. I have also received correspondence regarding the same matters from Commissioner Jim Ruegamer and County Attorney Clarence Belue.

Your first inquiry concerns section 7-4-2708, MCA, which provides:

In any county, the county commissioners may, upon consent of the county attorney, employ any other attorney licensed in Montana to perform any legal service in connection with the civil business of the county.

As I understand the background for the inquiry, Big Horn County is a defendant in four lawsuits pending in state and federal court. The county attorney is presently representing the county in these suits following the board's decision to terminate the services of a private attorney who had been employed by the board upon the recommendation and with the consent of the county attorney. Although the board wishes to hire another private attorney, the county attorney has withdrawn his consent to the employment of other counsel and has indicated that he will continue to represent the county in a private capacity in the four lawsuits.

Section 7-4-2708, MCA, together with section 7-4-2707, MCA, was enacted by the Montana Legislature in 1979 to provide for the rendition of county legal services by persons other than the county attorney. At least with regard to first-class counties, the 1979 statutes require the consent of the county attorney for the employment of outside counsel to perform legal services for the county, but do not expressly provide for resolution of disagreements between the commissioners and the county attorney regarding the necessity for employing outside counsel.

Section 7-4-2711(1), MCA, provides that the county attorney is the legal adviser of the board of county commissioners and must defend all suits brought against his county. He may not accept a fee in addition to his salary as county attorney for the defense of such lawsuits. See, e.g., 37 Op. Att'y Gen. No. 63 (1977). It is not only the duty, but also the right and privilege of the county attorney to represent the county

in matters of law in which the county is interested. See 27 C.J.S. District and Prosecuting Attorneys § 12(1).

Section 7-5-2104, M.C.A., provides that the board of county commissioners has jurisdiction and power to direct and control the prosecution and defense of all suits to which the county is a party. This grant of authority is consistent with the responsibility of the county commissioners, set forth in section 7-5-2101, MCA, to represent the county and have the care of the county property and the management of the business and concerns of the county. Such statutory authority has been held to clearly embrace the power to designate and employ special counsel to represent the county's interests, even where the county attorney has a duty imposed by statute to provide legal representation for the county. See Reed v. Gormley, 91 P. 1093 (Wash. 1907).

The consent required by section 7-4-2708, MCA, serves at least two purposes: (1) It provides notice to the county attorney in those situations where the county commissioners have not consulted the county attorney regarding outside counsel or the county attorney has not himself suggested the commissioners employ outside counsel, and (2) it allows the county attorney to review the need for employing outside counsel to perform legal services which might otherwise be performed by the county attorney without additional expense to the county.

Generally, the county attorney and the board of county commissioners stand in the same position as that of attorney and client with regard to the civil legal business of the county; where control of litigation is placed with the board, the county attorney should act under its direction. See 27 C.J.S. District and Prosecuting Attorneys § 12(5). This may include withdrawing and consenting to the employment of special counsel. There are numerous reasons why the board may wish to employ special counsel. The county attorney's absence, illness, refusal to act, differences on public policy, personal conflicts, or pressure of official business may effectively leave the county without necessary counsel, even in a grave emergency, or the litigation may involve conflicts between departments or officers of the county. The board should not be precluded from employing special counsel as reasonably

required under such circumstances. See 56 Am. Jur. 2d Municipal Corporations §§ 220, 221; 1 Op. Att'y Gen. at 190 (1905).

Although section 7-4-2708, MCA, requires consent of the county attorney for the employment of special counsel, the statutes and authorities discussed above lead me to conclude that such consent may not be unreasonably withheld where the board has compelling reasons for its decision. Except in the most unusual circumstances, the county attorney should defer to the board's decision to employ special counsel. If the county attorney disagrees with the board and withholds his consent, the board may request that the Attorney General review this conclusion and exercise supervisory power, if appropriate, over the county attorney, pursuant to section 2-15-501(5), MCA, by directing the county attorney to consent to the employment of special counsel.

It is my opinion that the board of county commissioners may select and employ special counsel to defend the county in lawsuits. The county attorney may not unreasonably withhold his consent to the employment of any other attorney for that purpose. If the board and the county attorney disagree on either the need for special counsel or which attorney should be employed, the board may request the Attorney General to exercise his supervisory authority over the county attorney. Special counsel may assist the county attorney in the case or may be substituted for the county attorney, pursuant to section 37-61-403, MCA.

Your second inquiry concerns a claim submitted by a private attorney for services rendered to the county clerk and recorder and two county commissioners. From the correspondence it is not clear whether the services were rendered in connection with the defense of a civil action brought by the county attorney in the name of the county against the county officers, or whether the claim concerns the attempted filing of a criminal action and subsequent appeal to the Montana Supreme Court. However, you limit your question to the civil action and ask whether these elected officials have the right under section 2-9-305, MCA, to be reimbursed for legal fees incurred for their defense if the county attorney and the county commissioners have not given specific consent to the officials to retain private counsel.

Section 2-9-305, MCA, provides for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment. This statute makes no exception for suits brought by the governmental entity employer against its own officers.

An action seeking to recover funds from county commissioners and the county clerk and recorder, brought by the county attorney pursuant to section 7-6-2323, MCA, is clearly a noncriminal action brought against employees of the county for actionable conduct committed while apparently acting within the course and scope of their offices or employment. Thus, the county is required by law to defend the action on behalf of the employees and indemnify the employees unless one of four specified exceptions applies. §§ 2-9-101(2), (3), (5); 2-9-305(2), MCA. The exceptions or exclusions are set forth in subsection (6) of section 2-9-305, MCA, as follows:

In a noncriminal action in which a governmental entity employee is a party defendant, the employee may not be defended or indemnified by the employer for any money judgments or legal expenses, including attorney fees, to which the employee may be subject as a result of the suit if a judicial determination is made that:

(a) the conduct upon which the claim is based constitutes oppression, fraud, or malice, or for any other reason does not arise out of the course and scope of the employee's employment;

(b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7;

(c) the employee compromised or settled the claim without the consent of the government entity employer; or

(d) the employee failed or refused to cooperate reasonably in the defense of the case.

Pursuant to section 2-9-305(3), MCA, an elected county officer having no supervisor would normally be required to give notice of the action to the county attorney, who is the legal officer of the county. However, since the action was brought by the county attorney in the name of the county, I conclude that no such notice would be necessary in this instance, nor would the county, as a named plaintiff, be able to provide a direct defense. Subsection (3) then allows the county officer to retain other counsel and requires the county to pay all expenses relating to the retained defense unless one of the subsection (6) exclusions applies. Subsection (4) of section 2-9-305, MCA, again makes it clear that the county must indemnify a county officer for attorney fees incurred by the officer in such a noncriminal action unless the conduct falls within the subsection (6) exclusions.

Section 2-9-305, MCA, does not require the defendant county officer to obtain consent from the commissioners and the county attorney in order to retain other counsel where the county refuses or is unable to provide a direct defense to the action. The provisions of section 7-4-2708, MCA, do not apply where the suit is brought against a county official individually and his retained counsel is not representing the county. See, e.g., 37 Op. Att'y Gen. No. 171 (1978).

It is my opinion that no such consent is required under section 2-9-305, MCA, and the commissioners and the clerk and recorder should be reimbursed by the county for legal fees incurred in defense of an action brought under section 7-6-2323, MCA, unless it is determined that an exclusion provided in section 2-9-305(6), MCA, applies. If there has not been a judicial determination concerning the subsection (6) exclusions, the county may proceed under subsection (7) to determine whether the exclusions apply. In the event of a dispute, this subsection allows the county to clarify its obligation to the county officials by commencing a declaratory judgment action or other legal action.

THEREFORE, IT IS MY OPINION:

1. A county attorney may not unreasonably withhold his consent to the employment of another attorney by the board of county commissioners to perform legal services in

connection with the civil business of the county. The decision of a county attorney to withhold his consent is subject to the supervisory authority of the Attorney General.

2. An elected county officer is not required to obtain the consent of the county attorney or the county commissioners in order to retain counsel in defense of a suit brought by the county attorney pursuant to section 7-6-2323, MCA. The county must reimburse the officer for legal fees incurred in the defense of the action unless an exclusion, as provided in section 2-9-305(6), MCA, applies.

Very truly yours,

MIKE GREELY
Attorney General