

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 15

CONSTABLES - Mileage reimbursement for;
COURTS - Mileage reimbursement for constables who serve
legal process;
PUBLIC OFFICERS - Mileage reimbursement for constables;
MONTANA CODE ANNOTATED - Title 3, chapter 10, part 7;
sections 2-18-503, 3-10-701, 3-10-703, 7-32-2143,
25-3-203, 25-31-408.

- HELD: 1. Parties involved in civil litigation in
justice court who desire to have legal process
served by a constable should prepay the cost
of service based upon the estimated roundtrip
mileage involved and the mileage reimbursement
rate established in section 2-18-503, MCA.
2. A constable should be reimbursed for travel
only upon the amount of miles actually
traveled at the legally established rate.
3. Any difference between the amount paid by the
parties to litigation for service of process
by a constable and the amount which the
constable is reimbursed accrues to the benefit
of the local governing body providing the
service.

24 April 1987

Robert L. Deschamps III
Missoula County Attorney
Missoula County Courthouse
Missoula MT 59802

Dear Mr. Deschamps:

You have recently requested my opinion on the following
question:

What are the mileage fees, if any, which
constables may charge for the service of civil
papers from justice and small claims courts?

It is first necessary to make a distinction between
mileage reimbursement to constables in the performance
of their duties and the mileage costs assessed to a
party in a civil proceeding for whom process is being
served. In other words, one issue is how much the
constable should be reimbursed for mileage, and the
other issue is how much a party to a civil proceeding

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should be charged for mileage costs. The answers to these separate questions are different based on existing Montana law.

I will first address the issue of mileage reimbursement for constables. Title 3, chapter 10, part 7, MCA, establishes the public office of constable and delineates the duties of the officeholder. Section 3-10-701, MCA, states:

Constables must attend the courts of justices of the peace within their counties whenever so required and execute, serve, and return all process and notices directed or delivered to them by a justice of the peace or by any competent authority of such county.

Section 3-10-703, MCA, provides that the salary for the office of constable is established annually by the board of county commissioners, and further states:

Constables shall receive mileage, at the rate provided by law, when performing their official duties.

Section 2-18-503, MCA, provides the method of determining mileage rate reimbursement for all public employees in Montana. The basic reimbursement rate for the use of a private automobile is "the mileage rate allowed by the United States internal revenue service for the preceding year." § 2-18-503(3), MCA. The law also limits reimbursement to "mileage for the distance actually traveled by automobile and no more unless otherwise specifically provided by law." § 2-18-503(1), MCA.

That reimbursement is limited to miles actually traveled is reiterated in former section 25-216, R.C.M. 1947 (now codified as section 7-32-2143(3)(b), MCA):

When any sheriff or constable serves more than one process in the same cause, not requiring more than one journey from his office, he shall receive mileage only for the more distant service, and no mileage in any case may be allowed for less than 1 mile actually traveled.

The case of State ex rel. Wynne v. Examining and Trial Board of Police Department of City of Butte, 43 Mont. 389, 117 P. 77 (1911), is also instructive. In that case, the police chief of Butte submitted a travel claim for roundtrip travel to Great Falls for the stated

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purpose of returning two prisoners. In fact, the sheriff had not made the trip and one of his deputies, who happened to be in Great Falls on personal business, had returned the prisoners. The sheriff paid his deputy \$13 out of his own funds, and then submitted a claim for \$68.80 to the county.

The Montana Supreme Court expressed its disapproval of this practice in the strongest possible terms:

The statute is plain. There are no perquisites, as such, attached to the performance of official duty in Montana. Our laws contemplate that officers shall be paid for actual service. The statute expressly declares that a sheriff, constable, or other peace officer, traveling in the discharge of his duties, shall charge only for each mile actually and necessarily traveled. Rev. Codes, § 3137. [Emphasis in original.]

Examining and Trial Board, supra, at 80.

Based on the foregoing citations, it is my opinion that a constable in the performance of public duties, which includes the serving of legal process in criminal and civil proceedings, is entitled to reimbursement for actual miles traveled by automobile according to the reimbursement rate established in section 2-18-503, MCA.

The second issue is the amount of mileage costs, if any, which should be charged to a party in a civil proceeding who desires to have legal process served by a constable. Section 25-3-203, MCA, provides:

In no case shall the officer receiving papers for service be required to serve the same unless the person in whose behalf the service is made or his agent or attorney first pay the cost of the service upon a demand therefor by the officer.

This section is applicable to justice courts according to section 25-31-408(2), MCA. Unfortunately, the statute does not specify what constitutes "cost of service." However, common practice and usage in Montana have always been to pay for the mileage of the process server. It is my opinion that the reimbursement rate established in section 2-18-503, MCA, should be used in calculating the "cost of service" together with an estimate of the number of miles required for roundtrip travel from the justice court.

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A complicating factor is that mileage reimbursement is necessarily paid prior to service of the process. Mileage is based upon an estimate and does not assume any operating efficiencies, such as being able to serve two or more legal processes in one trip. It would be very difficult to foresee such possibilities, however. Consequently, if there are actual operating efficiencies in the service of legal process they should accrue to the benefit of the governmental entity providing the service.

THEREFORE, IT IS MY OPINION:

1. Parties involved in civil litigation in justice court who desire to have legal process served by a constable should prepay the cost of service based upon the estimated roundtrip mileage involved and the mileage reimbursement rate established in section 2-18-503, MCA.
2. A constable should be reimbursed for travel only upon the amount of miles actually traveled at the legally established rate.
3. Any difference between the amount paid by the parties to litigation for service of process by a constable and the amount which the constable is reimbursed accrues to the benefit of the local governing body providing the service.

Very truly yours,

MIKE GREELY
Attorney General