

VOLUME NO. 43

OPINION NO. 75

CLERKS - Clerks of court and county clerks, disposition of fees for providing abstracts;

COUNTY OFFICERS AND EMPLOYEES - Clerks of court and county clerks, disposition of fees for providing abstracts;

COURTS, DISTRICT - Disposition by clerk of fees for abstracts;

FEES - Disposition by clerk of court and county clerk of fees for providing abstracts;

MONTANA CODE ANNOTATED - Sections 2-16-406(1), 3-2-404, 3-5-515, 7-4-2403, 7-4-2511, 7-4-2631, 25-1-201.

HELD: The clerk of the district court and the county clerk, as well as their deputies, may not retain for their personal use compensation paid to them by title companies, credit bureaus, banks, realtors, and others for the preparation on a regular basis of abstracts of instruments recorded and filed in their respective

offices. Such services are "official services" provided by the officers and the fees they receive for those services must be paid to the county general fund, the district court fund, or the state, as provided by law.

November 8, 1990

Robert Slomski
Sanders County Attorney
P.O. Box 519
Thompson Falls MT 59873

Dear Mr. Slomski:

You have requested my opinion on the following questions:

1. May the clerk of the district court and the county clerk, as well as their deputies, retain for their personal use compensation paid to them by title companies, credit bureaus, banks, realtors, and others for the preparation on a regular basis of abstracts of instruments recorded and filed in their respective offices, or are those officials required to submit any such compensation to the county treasurer?
2. If the above-named officials may receive such compensation for their personal use, may the board of county commissioners adopt a policy or resolution requiring the county clerk and clerk of the district court to pay any such compensation over to the county treasurer, or prohibiting those officials from receiving such outside compensation?

You have informed me that the Sanders County clerk of district court and the county clerk and her deputies have, for some time, prepared abstracts of documents recorded and filed in their offices for the use of private title companies, credit bureaus, banks, realtors, and other interested parties. These abstracts are prepared during office hours, as time permits. For preparing the abstracts, these county employees receive personal compensation from the requesting private entities on a regular weekly or biweekly basis.

Section 7-4-2511(1), MCA, states:

Each salaried county officer must charge and collect for the use of his county and pay into the county treasury ... all fees now or hereafter allowed by law, paid or chargeable in all cases[.]

Subsection (2) of that section continues:

No salaried county officer may receive for his own use any fees, penalties, or emoluments of any kind, except the salary as provided by law, for any official service rendered by him. Unless otherwise provided, all fees, penalties, and emoluments of every kind collected by a salaried county officer are for the sole use of the county and must be accounted for and paid to the county treasurer as provided by subsection (1) and credited to the general fund of the county.

Montana law also provides that "[w]henver the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes his deputies." § 7-4-2403, MCA. The fees collected by the county clerk and deputy clerks are for the sole use of the county. § 7-4-2631, MCA. The fees collected by the clerk of the district court are credited to the district court fund or the county general fund, or remitted to the state. §§ 3-5-515, 25-1-201, MCA.

The first issue to be resolved is whether the preparation of abstracts is an "official service" of the clerk of district court and the county clerk. If preparation of the abstracts is an official service, the fees should not be personally retained by the clerks or their deputies. In my opinion, preparation of the abstracts is an official service of the respective offices. The fees county clerks are statutorily required to charge for their respective counties include a fee "for searching an index record of files of the office for each year when required in abstracting or otherwise, 50 cents." § 7-4-2631(1)(g), MCA. This language expressly includes the type of searches described in your inquiry as being made by the Sanders County clerk and deputy clerks. The fees to be collected by the clerk of the district court include a fee "for search of court records, 50 cents for each year searched, not to exceed a total of \$25." § 25-1-201(1)(g), MCA.

In a case dealing with nearly the same question, the Supreme Court of Minnesota held nearly 90 years ago that such actions were within the scope and purview of the official employment of the clerk of the district court. Board of Commissioners of Hennepin County v. Dickey, 90 N.W. 775 (Minn. 1902). In Hennepin the clerk of the district court had previously been paid pursuant to a special fee schedule. In 1891, the clerk was given a fixed salary in lieu of all the fees he previously had been allowed to collect for his personal use. He was then required to turn over to the county treasury all fees collected by him in his official capacity. The Minnesota Supreme Court held that the services of the clerk involved in providing abstracts were official in their nature and scope and required payment of fees for abstracts to the county, stating:

A charge is authorized "for searching the records and files *** if a copy is not required." ... We are unable to give force to the suggestion that the transcription from legal documents or from the files as made up from time to time did not require a search, nor can we force a distinction between such searches and the examination required to make the statements to the abstract men and agencies upon the theory that a search involves the looking for something that was not previously known, but would have to be found. ... The word "search" as thus used in the schedule should be treated as the equivalent of any examination the clerk must make to give an accurate report thereof; and to say that such examination is not a search within the intent of the fee bill is but the merest quibble.

90 N.W. at 777-78.

In another case involving fees, Strafford County v. Holmes, 376 A.2d 126 (N.H. 1977), the register of deeds, for a period of years, personally received money from a bank for updating titles to real estate in which the bank was interested from the time of a prior search of title to the closing of the transaction involved. Effective January 1, 1974, the statute regarding the collection and disposal of fees collected by the register was amended to require the register to pay over to the county treasurer all charges paid to him for services arising out of or because of his office as well as all fees received by him. 376 A.2d at 129. The Supreme Court of New Hampshire stated:

We are of the opinion that the addition of "charges" to "fees", previously required to be paid to the county treasurer under RSA 478:18-a, manifests an intent on the part of the legislature to broaden the type of remuneration which the register is to turn over to the county.

376 A.2d at 129-30. The New Hampshire court required the register to pay to the county treasurer all fees received by the register for abstracts since the change in the law. Similarly, as already noted, under Montana law, unless otherwise provided, all fees and emoluments of every kind for any official service rendered are for the sole use of the county and must be accounted for and paid to the county treasurer.¹ This language indicates a legislative intent to broadly construe the type of remuneration which the county officers are obliged to remit to the county or other government fund.

Two cases in Montana have addressed the proposition that the clerks should be able to privately retain the money they receive for preparing abstracts.

¹As noted above, the law does provide otherwise regarding disposal of funds collected by the clerk of district court. § 25-1-201, MCA.

However, the cases are not persuasive in this instance. The first of those cases, Anderson v. Hinman, 138 Mont. 397, 357 P.2d 895 (1960), concerned the disposition of fees collected by the clerk of the Supreme Court, rather than a district court clerk or county clerk. In Hinman, the Supreme Court held that the clerk of the Supreme Court was not required to account to the state for charges made for voluntarily furnishing uncertified and unauthenticated copies of newly issued Supreme Court opinions to West Publishing Company. The statutes regarding disposition of fees collected by the clerk of the Supreme Court do not contain the language in section 7-4-2511(2), MCA, regarding county officers requiring "all fees ... and emoluments of every kind" to be paid to the government. See §§ 2-16-406(1), 3-2-404, MCA. Hinman also concerned fees received for providing a function which the Court held was not required by any law and could have been as appropriately performed by any other person. 357 P.2d at 902-03.

The second Montana case concerning this issue is Platz v. Hamilton, 201 Mont. 184, 653 P.2d 144 (1982). In Platz, the Montana Supreme Court found that the execution of passport applications, a function of the clerk of district court authorized by federal law, was not an official duty imposed upon a clerk of district court by state statute. The Court held that, since the Legislature had not enacted a specific statute with regard to the disposition of the passport fees, the clerk could retain the fees for her personal use and was not required to remand them to the county general fund. In my opinion, the situation currently at issue is distinguishable from the Platz case because the state statutes set forth a fee for search of the court records (§ 25-1-201(1)(g), MCA), in the case of the clerk of district court, and a fee for searches when required in abstracting (§ 7-4-2631(1)(g), MCA) in the case of the county clerk. I conclude that such searches of records and abstracts by the clerks are official services of the offices they hold and the clerks may not retain for their personal use the compensation they receive for those services. I therefore need not address your second question.

THEREFORE, IT IS MY OPINION:

The clerk of the district court and the county clerk, as well as their deputies, may not retain for their personal use compensation paid to them by title companies, credit bureaus, banks, realtors, and others for the preparation on a regular basis of abstracts of instruments recorded and filed in their respective offices. Such services are "official services" provided by the officers and the fees they receive for those services must be paid to the county general fund, the district court fund, or the state, as provided by law.

Sincerely,

MARC RACICOT
Attorney General