

**LETTER OPINION
2001-L-37**

September 14, 2001

Ms. Mary K. O'Donnell
Rolette County State's Attorney
PO Box 1079
Rolla, ND 58367-1079

Dear Ms. O'Donnell:

Thank you for your September 13, 2001, letter asking whether a board of county commissioners may hire a private attorney to represent the board without first obtaining the advice and consent of the county state's attorney.

"Counties are creatures of the North Dakota Constitution and may act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority. As a political subdivision of the State, its rights and powers are determined and defined by law." McKenzie County v. Hodel, 467 N.W.2d 701, 707-708 (N.D. 1991) (VandeWalle, J., concurring) (citations omitted). "The board of county commissioners is charged with the supervision of the conduct of the county officials, but it has no right to perform their duties or to exercise their prerogatives, and it has no right to delegate to others authority which it cannot itself exercise." Murphy v. Swanson, 198 N.W. 116, 119-120 (N.D. 1924). The state's attorney is "the officer whose express duty it is to advise and counsel the board [of county commissioners] and other officers." Id. at 119. Although the board of county commissioners has general authority to act in legal matters, it may only do so through the state's attorney because the state's attorney is the officer charged with these specific duties. Fox v. Jones, 102 N.W. 161, 162 (N.D. 1905). The board has no authority to employ another attorney to perform the state's attorney's duties aside from specific authority granted by statute. Id.

A board of county commissioners is allowed to employ additional counsel to assist the state's attorney under certain circumstances:¹

¹ Other laws, not relevant here, allow a district judge to appoint special counsel to perform the state's attorney's duties. See N.D.C.C. §§ 11-16-06, 11-16-07.

The board of county commissioners, in cases of public importance and with the advice and consent of the state's attorney, may employ additional counsel to assist the state's attorney. Such counsel shall receive such compensation as may be agreed upon between the parties.

N.D.C.C. § 11-16-08. A member of my staff spoke with you and learned that the reason you are requesting assistance with your duties is because of a conflict between the board of county commissioners and the county social service board, which you also represent in your official capacity. Any attorney appointed to advise either entity in this matter will be performing the official duties of the state's attorney.² The law requires the state's attorney's consent before another person may perform the state's attorney's duties as an elected official.³

Therefore, it is my opinion that a board of county commissioners may not hire a private attorney to represent the board without first obtaining the advice and consent of the county state's attorney. Any person so appointed must file the required oath of office. N.D.C.C. § 11-16-02.

Sincerely,

Wayne Stenehjem
Attorney General

vkk

cc: Judith G. Boppre, Rolette County Auditor
Arne F. Boyum, Jr.

² Further, the state's attorney is responsible for the acts of any appointed assistant state's attorney. N.D.C.C. § 11-16-02.

³ However, the board of county commissioners may establish employment or personnel policies that may constrain elected officials discretion in hiring or discharging their deputies, clerks or assistants. 1993 N.D. Op. Att'y Gen. L-333, L-335.