

**LETTER OPINION
2014-L-08**

May 28, 2014

Ms. Maggie D. Anderson
Executive Director
Department of Human Services
600 E Boulevard Ave. Dept. 325
Bismarck, ND 58505-0250

Dear Ms. Anderson:

Thank you for your letter requesting my opinion whether a county state's attorney is required to represent the county social service board, particularly in matters involving the county social service board's statutory duties under N.D.C.C. §§ 27-20-30.1 concerning foster care case management and 50-01.2-03 concerning the general duties of a county social service board. For the reasons stated below, it is my opinion that a county state's attorney is required to represent a county social services board when fulfilling its duties under N.D.C.C. §§ 27-20-30.1 concerning foster care case management and 50-01.2-03 concerning the general duties of a county social service board.

ANALYSIS

The North Dakota Supreme Court held in Fox v. Jones that the state's attorney is the county officer who should institute actions on behalf of the county government and that the board of county commissioners may not approve another person to perform legal duties on behalf of the county.¹ This opinion was based on an analysis of the statutory duties relating to state's attorneys and county commissions.² The general duties of a state's attorney are set out in N.D.C.C. § 11-16-01. Among other things, the state's attorney is required to:

5. Defend all suits brought against the state or against the county.

¹ Fox v. Jones, 102 N.W. 161 (N.D. 1905).

² Id.

6. Prosecute all bonds forfeited in the courts of record of the county and prosecute all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or to the county.
...
9. Give, when required and without fee, the state's attorney's opinion in writing to the county, district, township, and school district officers on matters relating to the duties of their respective offices.
...
12. Act as legal adviser of the board of county commissioners, attend the meetings thereof when required, and oppose all claims and actions presented against the county which are unjust or illegal.³

Further, a board of county commissioners has the power “[t]o institute and prosecute civil actions for and on behalf of the county and in its name” and “[t]o do and perform any other duties prescribed by law.”⁴ The Court held that where a county agency needed to conduct legal work, the state’s attorney was the only attorney who could perform such work.⁵

In addition, the Court in Fox also noted the statutory authority for a district judge to request this office, or to appoint another attorney, to take charge of proceedings where the state’s attorney has neglected to perform his or her duties.⁶ These duties are described as “any of the duties prescribed in subsections 2 through 6 of section 11-16-01,⁷ or to institute any civil suit to which the state or the county is a party.”⁸ Thus, it is my opinion that the state’s attorney is responsible for all legal representation of

³ N.D.C.C. § 11-16-01.

⁴ N.D.C.C. § 11-11-14(1), (17).

⁵ Fox, 102 N.W. at 162 (“This service [collecting a judgment] was work for a lawyer, and McHenry County had such officer [the state’s attorney], whose compensation was already provided in his salary.”).

⁶ Fox, 102 N.W. at 162; see also N.D.C.C. § 11-16-06.

⁷ There are provisions in N.D.C.C. § 11-16-01 which require the state's attorney to provide advice or representation to entities other than county government. These provisions do not imply that the state's attorney does not represent parts of county government that are not specifically mentioned in section 11-16-01. It may reasonably be inferred that the legislative intent for adding these other governmental entities to the state’s attorney’s duties is because these other local governmental entities were created without an attorney as an officer, and would need to rely on the county’s state’s attorney for legal advice.

⁸ N.D.C.C. § 11-16-06 (emphasis added).

county government, including all legal duties that may be undertaken by the county's agencies such as a social service board.

You specifically asked about representation in foster care case management service matters. Foster care services are addressed in the Uniform Juvenile Court Act, N.D.C.C. ch. 27-20. A deprived child, as defined in this chapter, may be transferred to the temporary custody of the director of the county social service board.⁹ County social service boards provide foster care services, including foster care case management, as part of their duties to provide human services and child welfare services.¹⁰ The Department of Human Services may release a county from this duty, but the county will retain the financial responsibility for these services unless otherwise approved by the Department.¹¹ For the purposes of certain individuals between the ages of 18 and 21 years of age who are found to be in need of continued foster care services, the court may make an order continuing foster care services and requiring that "the administrative county, as determined by the [D]epartment [of Human Services], shall continue foster care case management, unless otherwise agreed to or required by the department."¹² Thus, this duty of foster care case management falls on the county government unless the Department of Human Services has agreed to a different entity to provide foster care case management.

A county is a political subdivision of the state, and its rights and powers are determined by law.¹³ A county may "speak and act only in the manner and on the matters prescribed by the Legislature."¹⁴ Accordingly, the Legislature may assign foster care case management duties to county governments. As stated previously, duties of county government that involve legal issues or court representation are the duties of the county state's attorney.

A state's attorney's duties in relation to a county's social service board are found in several places in the Century Code. Section 14-08.1-04, N.D.C.C., requires the state's attorney to commence an action for the recovery of public assistance or county general assistance upon the request of the county social service board director or the executive director of the Department of Human Services. Further, in a more general sense, N.D.C.C. § 50-01.2-05 provides:

⁹ N.D.C.C. § 27-20-30(1).

¹⁰ N.D.C.C. § 50-01.2-03(1), (2) & (7).

¹¹ N.D.C.C. § 50-01.2-03(7).

¹² N.D.C.C. § 27-20-30.1(4)(h).

¹³ Eikevik v. Lee, 13 N.W.2d 94, 97 (N.D. 1944).

¹⁴ Dornacker v. Olson, 248 N.W.2d 844, 849-850 (N.D. 1976) (citations omitted).

Actions and proceedings - Duty of state's attorney.

Any suit or other proceeding arising out of the administration of the laws pertaining to the support of persons eligible for county general assistance must be brought by or against the county in its corporate name. The state's attorney shall institute and conduct or defend any and all actions or proceedings that may be instituted under chapter 50-01.¹⁵

The state's attorney's duties, with respect to any and all actions or proceedings that are instituted under chapter 50-01, relate to the statutory provision providing that "each county in this state is obligated . . . to provide county general assistance to persons who are residents of the county and who are eligible."¹⁶

The general duties of a county social service board are found in N.D.C.C. § 50-01.2-03. Prior to 1995,¹⁷ the statutory language setting out the general duties of a county social service board was found in N.D.C.C. ch. 50-01, as was language requiring the state's attorney to conduct all actions or proceedings involving the county social service board. The changes made by S.B. 2037, 1995 N.D. Leg., moved the general duties of a county social service board to N.D.C.C. § 50-01.2-03 and caused N.D.C.C. § 50-01.2-05 to provide that the "state's attorney shall .. conduct ...all actions or proceedings that may be instituted under chapter 50-01." This seemingly omits the county social service board's general duties under Section 50-01.2-03 from the requirement that the state's attorney represent the county board under Section 50-01.2-05. However, a review of the legislative history shows no intent to deprive a county social services board of its general legal representation by the state's attorney. Further, these changes do not show a legislative intent to contradict the Supreme Court's opinion in Fox.¹⁸ To infer an intent to deprive the county social service board of representation by the state's attorney would be absurd since this interpretation would require a county agency to perform a duty that requires legal representation while that agency is denied any legal representation other than the state's attorney under the Fox decision.

¹⁵ N.D.C.C. § 50-01.2-05.

¹⁶ N.D.C.C. § 50-01-01.

¹⁷ See S.B. 2037, 1995 N.D. Leg. (1995 N.D. Sess. Laws ch. 456).

¹⁸ Fox v. Jones, 102 N.W. 161 (N.D. 1905). It is presumed that a legislative amendment is intended to change existing law except when the clear purpose of the amendment is to merely clarify existing law. Scott v. N.D. Workers Comp. Bureau, 587 N.W.2d 153, 156 157 (N.D. 1998). In this instance, the legislative purpose was principally to recodify and rearrange existing laws into a more orderly fashion, and update archaic language. Hearing on S.B. 2037 Before the Senate Human Services Comm. 1995 N.D. Leg. (Jan. 10, 1995) (statements of Sen. Russell T. Thane and Jim Smith, Legis. Council).

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Therefore, it is my opinion that a county state's attorney is required to represent a county social services board when fulfilling its duties under N.D.C.C. §§ 27-20-30.1 concerning foster care case management, and 50-01.2-03 concerning the general duties of a county social service board.¹⁹

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁰

¹⁹ N.D.A.G. 67-56 is overruled to the extent it is contradicted by this opinion. That opinion failed to address or analyze the Fox decision.

²⁰ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).