



NEIL F. HARTIGAN  
ATTORNEY GENERAL  
STATE OF ILLINOIS  
SPRINGFIELD

February 17, 1983

FILE NO. 83-001

COUNTIES:  
Liability for Fees of  
Attorneys Privately Retained by  
County Officers

Honorable Jon C. Anderson  
State's Attorney  
Crawford County  
Robinson, Illinois 62454

Dear Mr. Anderson:

I have your letter in which you inquire whether Crawford County is liable for attorney's fees and litigation expenses incurred by its supervisor of assessments and one member of its board of review in challenging certain petitions for the submission of public questions to referendum. For the reasons hereinafter stated, I agree with your opinion that Crawford County is not liable for such expenses.

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You describe the following facts and circumstances which have prompted your question: on August 16, 1982, two petitions were filed in the office of the Crawford County clerk proposing that two public questions be submitted to the electorate by referendum at the November, 1982, general election. One petition proposed a referendum on the question "Shall the office of the Supervisor of Assessments be elective rather than appointive?"; the second proposed a referendum on the question "Shall the office of member of the Board of Review be elective rather than appointive?".

On August 19, 1982, the supervisor of assessments requested and received from you a letter stating that because the State's Attorney is by statute denominated as a member of the county officers electoral board (Ill. Rev. Stat. 1981, ch. 46, par. 10-9), which board is required to hear and pass on objections to petitions proposing the submission of questions of public policy relating to the county to referendum (Ill. Rev. Stat. 1981, ch. 46, par. 28-4), you would be unable to advise or otherwise represent him in such matters. Immediately thereafter the supervisor of assessments and one member of the board of review filed objections to the petitions in the office of the Crawford County clerk.

The county officers electoral board subsequently sustained the objections and dismissed the petitions. During the

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pendency of the proceedings before the board, both objectors were represented by privately retained counsel. Both objectors claim to have filed their objections in their official capacity as county officers, and have requested the Crawford County board to pay the fees and litigation expenses of the attorneys retained by them to challenge the petitions. Apparently, it is their contention that it was the duty of the State's Attorney to represent them in this proceeding, and because of the conflict of interest created by your responsibility as a member of the county officers electoral board, they were entitled to retain private counsel.

Section 5 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1981, ch. 14, par. 5) provides in pertinent part:

"The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

\* \* \*

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

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The State's Attorney is the attorney and legal adviser for the county. (Ashton v. County of Cook (1943), 384 Ill. 287, 299-300.) It is the State's Attorney's duty, pursuant to statute, to commence and prosecute all actions and proceedings brought by any county officer in such officer's official capacity. (Ill. Rev. Stat. 1981, ch. 14, par. 5; Ill. Att'y Gen. Op. No. NP-760, issued May 24, 1974.) When a conflict of interest prevents a State's Attorney from fulfilling this duty, a special State's Attorney may be appointed pursuant to section 6 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1981, ch. 14, par. 6). Lavin v. Comm'rs of Cook County (1910), 245 Ill. 496, 502.

Section 6 of "AN ACT in regard to attorneys general and state's attorneys" provides in pertinent part:

"Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general or state's attorney would have had if present and attending to the same \* \* \*."  
(Emphasis added.)

If, because of the State's Attorney's interest in a proceeding, a special prosecutor is appointed to prosecute or defend an action, the county becomes liable for his fees and litigation

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expenses. (In re Petition of McNulty (1978), 60 Ill. App. 3d 701; Lavin v. Comm'rs of Cook County (1910), 245 Ill. 496, 502.) The appointment of a special State's Attorney involves the exercise of judicial discretion upon a showing of cause (People ex rel. Baughman v. Eaton (1974), 24 Ill. App. 3d 833, 834; Abbott v. County of Adams (1919), 214 Ill. App. 201, 207), and the fact that an appointment of one or more special State's Attorneys would require a county to bear the expense of both prosecuting and defending a suit, does not limit the power of a court to make such appointments. (Armentrout v. Dondanville (1979), 67 Ill. App. 3d 1021, 1029-30.) Without the requisite court appointment, however, private counsel is not entitled to payment of fees and expenses from county funds. Hutchens v. Wade (1973), 13 Ill. App. 3d 787, 790.

In opinion No. NP-760, issued May 24, 1974, Attorney General Scott addressed the question of the liability of a county for private attorney's fees where a county board member retained private counsel to seek an injunction to prohibit county deputies from picketing a business which he owned. Attorney General Scott advised therein:

" \* \* \*

The action instituted by the County Board member through private counsel, depending upon the allegations contained in and relief sought by the application for injunction, could be characterized as either an action brought by said member in his capacity as a private individual for the purpose of protecting his

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private business from economic or other harm that could have ensued from said picketing, or an action brought by said member in his capacity as a county official for the purpose of restraining county deputies from picketing. It is my opinion that regardless of the purpose of the injunctive proceeding, the Tazewell County Board cannot legally reimburse, nor be held liable to, said County Board member for the legal fees incurred in said action.

\* \* \*

In regard to the hiring of a private attorney by a county official on behalf of the county, the Illinois Supreme Court, in holding that a state's attorney is the attorney and legal adviser for the county, stated that a county cannot employ an attorney to render legal advice to the county board or do legal work for the county. (Ashton v. County of Cook, 384 Ill. 287; Abbott v. County of Adams, 214 Ill. App. 201; Op. Atty. Gen. S-565, March 28, 1973.) \* \* \*

\* \* \*

Since the state's attorney is the attorney and legal adviser for a county, a county board cannot hire a private attorney, or reimburse a county board member who hires such an attorney, for the purpose of instituting an action to restrain public officials, such as county deputies, from picketing. Consequently, any such action by a county board would be ultra vires. \* \* \*

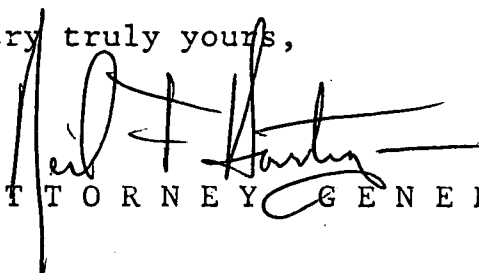
In the circumstances which you have described, it does not appear that the objections brought by the supervisor of assessments and the board of review member were actions or proceedings commenced in their official capacities, which the State's Attorney would be required to prosecute. Actions taken by an officer in his official capacity consist of actions taken either under color of his office or by virtue of his office.

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(1974 Ill. Att'y Gen. Op. 274, 276.) Nothing in the statutory powers and duties of the offices in question authorizes an incumbent to take official action with regard to the method of selection pertaining to the office which he holds. Therefore, it does not appear that you would have been under a duty to advise or represent them in this matter.

For purposes of county liability for attorney's fees and litigation costs, however, it is of no consequence whether the actions of the supervisor of assessments and the board of review member were instituted in their official or private capacities, or if you as State's Attorney would have been under a duty to represent them in this matter. In the absence of the appointment of a special State's Attorney, Crawford County is not liable to pay attorney's fees and litigation expenses incurred by county officers. Therefore, any payment by the county in the present circumstance would be ultra vires.

Very truly yours,



A T T O R N E Y G E N E R A L