

**OPINION
67-26**

February 22, 1967 (OPINION)

Mr. M. G. Anderson

City Auditor

LaMoure, North Dakota

RE: Cities - City Attorney - Mandatory Office

This office acknowledges receipt of your letter of February 16, 1967, which reads as follows:

Our City Council wishes to question whether a municipality must appoint or obtain a City Attorney, or if it may elect to hire legal aid as needed.

Our City is experiencing difficulty retaining an attorney at a salary within our budget. Are salary guidelines for this position available for cities of varying population in our State?

Are the services of the County elected States Attorney available to municipalities?"

With reference to the legal necessity for appointment of a City Attorney, section 40-14-04 of the North Dakota Century Code dealing with the appointive city officers has this to say:

The mayor, with the approval of the city council, shall appoint the following officers:

1. A city auditor;
2. A city assessor;
3. A city attorney;

* * * " (Emphasis supplied)

As used in the statutes, the word "shall" is generally imperative or mandatory but it may be construed as merely permissive or directory to carry out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no private or public right is impaired by its interpretation in the other sense. (Black's Law Dictionary, 2nd, P. 1081).

In view of the several duties imposed upon the city attorney by section 40-20-01 of the Code, we hold to the view that it was the legislative intent to make the appointment of a city attorney mandatory, since the performance of these duties are essential to the government of a municipality. Section 40-20-01 is as follows:

CITY ATTORNEY - DUTIES - DOCKET. The city attorney shall:

1. Conduct all law business in which the city or any of its departments shall be interested;
2. Furnish written opinions, when requested, upon all questions submitted to him by the governing body or any of the departments of the city;
3. Draft all ordinances, bonds, contracts, leases, conveyances, and other instruments which may be required by the officers of the city;
4. Examine tax and assessment rolls and all proceedings in reference to the levying and collecting of city taxes;
5. Keep a docket of all cases to which the city may be a party in any court of record in which shall be entered briefly all steps taken in each such case, and such docket shall be open to public inspection at all reasonable hours; and
6. Perform all other duties which may be prescribed by the governing body or by the ordinances of the city or the statutes of the state."

In an opinion issued by this office under date of May 25, 1955, the following interpretation is expressed:

Now, as to the performance of the duties of a city attorney, those duties are set forth in section 40-2001 of the North Dakota Revised Code of 1943.

"In our opinion these official duties must be performed by the city attorney or by his duly appointed, qualified, and acting assistant, or assistants."

(Report of Attorney General, 1954-56, page 19)

The opinion goes on to say that under section 40-20-02 the governing body may employ special counsel when it deems such counsel necessary for the best interests of the city, but ordinarily the duties outlined in section 40-20-01 are to be performed by the city attorney, his assistant, or assistants as well as all other duties as may be prescribed by the governing body, or by the ordinances of the city, or by the statutes of the state.

In your letter you ask if the services of the state's attorney are available to municipalities.

Section 11-16-01 outlines the duties of the state's attorney, and among other things he is required to "give, when required, and without fee, his opinion in writing to the county, district, township, and school district officers on matters relating to the duties of their respective offices." There is no statutory duty imposed upon the state's attorney to represent or advise the officials of a city.

Taking into account the foregoing discussion, it is our opinion that it is the mandatory duty of the mayor of a city, with the approval of the city council, to appoint a city attorney.

Concerning the salary schedule for city attorneys in North Dakota, we are not in a position to give you any reliable information.

HELGI JOHANNESON

Attorney General