

render such legal assistance as may be necessary in carrying out the provisions of this act."

Section 7 of the act (Burns' 63-1523) is as follows:

"The Board shall enforce and administer the provisions of this act, to (and) make such rules, not inconsistent with the constitution and laws of this state, as may be reasonably necessary for the proper performance of its duties and the regulations of the proceedings before it. The Board shall adopt and have an official seal."

In answer to your third question, the law does not require that the charges be filed by a resident of the county in which the alleged violations have been committed. A proper, but not exclusive, procedure would be for the Board or its representatives to call an alleged violation to the attention of the proper prosecuting attorney where it is thought criminal prosecution should be commenced.

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OFFICIAL OPINION NO. 65

October 28, 1947.

Mr. C. E. Ruston, State Examiner,  
State Board of Accounts,  
Room 304, State House,  
Indianapolis, Indiana.

Dear Sir:

I have your letter of recent date in which you request an official opinion on the following questions:

"1. Is the judge of a circuit court or superior court authorized by law to appoint an assistant prosecutor to assist the regular prosecutor in the performance of his statutory duty?

"2. If your answer is in the affirmative, can such assistant prosecutor be compensated on order of the court without a pre-existing appropriation?

“3. Is the prosecuting attorney, grand jury, or deputy prosecutor, individually or collectively, authorized by law to incur expense on their own initiative which shall purport to be an obligation of the county, either

- (a) in the absence of an appropriation
- (b) or beyond the unexpended balance of an appropriation.

“4. If your answer to the third question is in the affirmative, is the county auditor authorized to make such payment upon presentation of verified claims out of funds not otherwise appropriated, either

- (a) upon allowance by the board of commissioners,
- (b) or upon approval by the judge of the court?

“5. Are the acts of the prosecutor and the grand jury during an investigation contingent upon the orders and instructions of the court?

“6. If your answer to the fifth question is in the affirmative, would the authorization of the court for the prosecutor and the grand jury to incur the expense herein mentioned permit the county auditor to pay such claims of expense without appropriation therefor?

“7. If it is legal for the court, prosecuting attorney or grand jury to incur the expense herein mentioned, in the absence of an appropriation, is it mandatory for the county council to make an appropriation upon proper request therefor?”

It was stated in the case of *Wood v. State* (1883), 92 Ind. 269:

“A prosecuting attorney may properly ask the court to appoint attorneys to assist him in the prosecution of a man accused of crime, and the court commits no error in granting the request. The law freely accords to the accused the assistance of such counsel as he may desire, and there is no reason why the same priv-

ilege should not be accorded to the State. The attorneys employed in this case were called by the prosecuting attorney, and we can not say that he did not act fairly and wisely in asking assistance, nor that the court abused its discretion in granting his request. Whether the attorneys can claim pay for their services, or whether the prosecutor can create any claim against the State or county, is not here the question. Our investigation does not extend in that direction, for we are simply to ascertain whether or not an error was committed which prejudiced the rights of the appellant. In holding, as we do, that the State may call counsel to assist in the prosecution, we are sustained by the very decided weight of authority. \* \* \*

The power of a court of general jurisdiction to appoint counsel to assist the prosecuting attorney in the prosecution of criminal causes before such court, when requested by the prosecuting attorney, is recognized by later cases. (Tull, Treasurer v. State, *ex rel.* Glessner (1884), 99 Ind. 238; Williams v. State (1918), 188 Ind. 283). It is my opinion that the judge of a circuit or superior court is authorized by law, *upon the request of the prosecuting attorney*, to appoint an assistant prosecutor to assist the regular prosecutor in the performance of his statutory duty.

Courts of general jurisdiction have inherent power to incur and order paid all such expenses as are necessary for the holding of such court and the proper administration of its duties; and such expenses as are necessary for them to function in the manner contemplated by the Constitution. The legislature has no authority to curtail and hamper courts in the exercise of such powers.

Knox County Council v. State, *ex rel.* McCormick (1940), 217 Ind. 493;

Dunn v. State, *ex rel.* Corydon (1932), 204 Ind. 390, 395;

14 Am. Jur. Courts, Section 171, page 371.

In answering your second question it becomes necessary to determine whether or not a power lodged in a court of general jurisdiction to appoint counsel to assist the prosecut-

ing attorney in the performance of his statutory duties is essential to the holding of such court and the proper administration of its duties; or is essential to its proper functioning within the contemplation of the Constitution.

In *Turner v. Board of Commissioners* (1901), 158 Ind. 166, it was held that since the taking effect of the county reform law, unless there be an existing appropriation made by the county council for the purpose of paying for services rendered by counsel appointed by the court to assist the prosecuting attorney in the prosecution of a criminal case at the time such appointment is made and the services rendered, the appointment and rendition of such services create no liability against the county; that the power of a court, body, or person, to bind a county, or create a liability against it, for the services of an attorney in assisting the prosecuting attorney in the prosecution of criminal cases, is within the control of the legislature.

This case was reaffirmed in *Board of Commissioners v. McGregor* (1909), 171 Ind. 634, with the additional holding that the county reform act does not invade the inherent power of courts in this respect. The court stated: "It may be, and frequently is, expedient and desirable that the State should have the assistance of other counsel in the conduct of important and difficult criminal causes which are ably resisted, but the duty of providing for such emergencies rests primarily with the legislature. The principle underlying the appointment of counsel for poor persons is materially different from that involved in the appointment of assistance for the prosecuting attorney. \* \* \*"

In view of the above decisions in my opinion the answer to your second question is in the negative.

I call your attention to the following statutes:

Section 26-525 Burns' 1933, Vol. 6, Acts 1899, Chapter 154, Section 25, page 343, providing as follows:

"No board of county commissioners, officer, agent or employee of any county shall have power to bind the county by any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the obligation attempted to be incurred, and all contracts and agreements, express or implied, and

all obligations of any and every sort beyond such existing appropriation are declared to be absolutely void.”

And Section 26-527, Burns' 1933, Vol. 6, Acts 1899, Chapter 154, Section 27, page 343, providing as follows:

“No court, or division thereof, of any county, shall have power to bind such county by any contract, agreement, or in any other way, except by judgment rendered in a cause where such court has jurisdiction of the parties and subject-matter of the action, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such court, and for the purpose for which such obligation is attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort attempted beyond such existing appropriations shall be absolutely void.”

The inhibitions of these statutes are broad enough, I think, to include the prosecuting attorney, deputy prosecuting attorney, and the grand jury, acting individually or collectively. By the terms of such statute, they or either of them have no authority to bind the county, or create a liability against it, in the absence of an appropriation therefor, or beyond the amount of money at the time already appropriated by ordinance and existing for the purpose; provided they, or either of them, do not possess inherent power to incur expenses and create a liability against the county in the investigation of crime which cannot be curtailed or hampered by the legislature.

Article 7, Section 17 of the Constitution of Indiana provides: “The General Assembly may modify, or abolish, the Grand Jury system.” Subsequent legislation pertaining to the subject indicates an increasing limitation upon the power and authority of grand juries. (*State v. Roberts* (1906), 166 Ind. 585.) A grand jury is bound and limited by the proscription of the law which calls it into existence. (24 Am. Jur. Grand Jury, Section 34, page 857.) It is an appendage of the court under whose supervision it is impaneled and has no existence aside from the court which calls it into existence and

upon which it is attending. Its functions are inquisitorial rather than judicial. (24 Am. Jur. Grand Jury, Section 2, page 832.) In *Allen v. Payne* (1934), 1 Cal. (2d) 607, it was held that a grand jury has no "inherent" power to employ persons to investigate crime and make the compensation of the investigation a charge upon the county. In *Burns International Detective Agency v. Doyle* (Nev.) (1922), 26 A.L.R. 600, the court held that the employment by a grand jury of a detective agency to investigate certain offenses and to aid in the procuring of evidence with respect thereto is void as contravening the public policy requiring such bodies to be free from bias and prejudice.

In Section 9-810, Burns' 1933, Volume 4, it is provided that the grand jury may, by unanimous vote and the consent of the court, employ a stenographer at not to exceed \$5.00 per day to take the minutes and the evidence. I find no other provisions in the law empowering the grand jury to incur expenses in the discharge of its duties. In the light of our fundamental law and statutes on the subject it would appear that the grand juries in this state are not clothed with inherent power to incur expenses purporting to be an obligation of the county in the absence of or beyond the unexpended balance of an appropriation for that purpose.

Our Constitution creates the office of prosecuting attorney, fixes the length of its term, but assigns to it no duties. The scope and nature of its duties are entirely dependent upon the legislature. The legislature may increase or diminish those duties at will. (State, *ex rel. Hench v. Morrison* (1878), 64 Ind. 141.) The chief duties of the prosecuting attorney, prescribed by statute, are to conduct all prosecutions for felonies and misdemeanors in his judicial circuit. (49-2504, *supra*.) It follows that if the legislature may prescribe the duties of the prosecuting attorney and increase or diminish them at will, it may also limit the incurring of obligations against the county by the prosecuting attorney in the discharge of the duties so prescribed. It does not appear that the office of prosecuting attorney has inherent power in the discharge of the duties appertaining thereto beyond the control of the legislature. A deputy prosecuting attorney can have no greater power and authority than the prosecuting attorney.

In my opinion the answer to your third question is in the negative.

Since the answer to your third question is in the negative an answer to your fourth question is obviated.

The judge of the circuit or criminal court may cause a grand jury to sit in any county of his circuit and may discharge such grand jury and order a new one drawn (Section 9-803, Burns' 1933, Volume 4, 1942 Replacement), and may adjourn a grand jury when in his opinion it has been in session long enough. (Section 9-804, *supra*.) After the grand jury is impaneled and sworn the court must charge them and plainly instruct them as to their duties and give them "such information as it may deem proper in relation to any charges and crimes returned into court, or likely to come before the grand jury" and the court shall "appoint one of such grand jurors as foreman." (Section 9-809, *supra*.) The court must also try challenges of members of the grand jury. (Section 9-812, *supra*.)

The principal function of a grand jury is to inquire into and investigate crimes and misdemeanors purportedly committed within the county and to return indictments in cases where it determines there is probably cause. The instructions given by the court as to its duties, and information in relation to any charges and crimes returned into court or likely to come before the grand jury, are for the guidance of such grand jury in the performance of its duties, and are not for the purpose of directing or controlling the result of its deliberations. I am of the opinion that the acts of the prosecutor and the grand jury during an investigation are not contingent upon the orders and instructions of the court.

The answer to your fifth question being in the negative, an answer to your sixth question is obviated.

In your seventh question you ask whether it is mandatory upon the county council to make an appropriation for expenses mentioned in your letter upon proper request therefor, if it is legal for the court, prosecuting attorney or grand jury to incur such expenses. The expenses mentioned in your letter are as follows:

"1. For services rendered by a person appointed by the court as an assistant to the regular prosecutor to assist in a grand jury investigation and subsequent trial of persons alleged to be involved in irregularities in the construction of certain county highways.

"2. For money advanced from personal funds by the regular prosecutor to an out of state chemical engineer employed and ordered by the prosecutor and grand jury to make certain tests of materials used in building the highways and the appearance of said engineer before the grand jury.

"3. For two days court testimony and consultation by the chemical engineer.

"4. For services rendered to the deputy prosecutor by an out of state attorney in securing information pertaining to the grand jury investigation."

Being of the opinion that it was beyond the power of the court, prosecuting attorney, or grand jury to bind the county or create a liability against it for such expenses without existing appropriations therefor; it would follow that it is not *mandatory* upon the county council to make additional appropriations upon request for the payment of such services which have already been rendered. However, you do not ask and I express no opinion concerning the power of the council to appropriate money, and the board of county commissioners to approve payment, for such services rendered the county in good faith.

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OFFICIAL OPINION NO. 66

November 7, 1947.

Mr. Forrest V. Carmichael,  
Executive Secretary,  
Indiana State Teachers' Retirement Fund,  
336 State House,  
Indianapolis, Indiana.

Dear Mr. Carmichael:

Your letter of September 25th has been received relative to Section 3, Chapter 353 of the Acts of 1947, which provides for increased pensions to teachers receiving annuities at the time of the passage of said act and which provides further an annual appropriation of \$300,000 from the general fund