

County Law §§ 210, 500, 500(1); Public Officers Law § 5

When county legislators serve staggered four-year terms, the county attorney's term of appointment runs during the two-year term of the appointing county legislature.

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Frederick R. Westphal  
County Attorney  
Cayuga County  
160 Genesee Street  
6<sup>th</sup> Floor  
Auburn, New York 13021

Informal Opinion  
No. 2014-3

Dear Mr. Westphal:

You have requested an opinion relating to the term of office of the county attorney. You have explained that by local law the term of county legislator is set at four years and the elections of the legislators are staggered with approximately half the legislature elected every two years. Because by state law the term of the county attorney is tied to the term of the county legislature, you have asked whether the staggered four-year terms of the county legislature result in a term of appointment for the county attorney of two years (the number of years between elections by which a significant portion of the legislature potentially is replaced) or four years (the term for which each legislator is elected). As explained below, we are of the opinion that the better answer is that the county attorney serves during the term of the county legislature as a board, which under the facts you have described is two years.

County Law § 500 requires that the county legislature “appoint a resident attorney-at-law as county attorney for the term of office for which the then members of such board were elected.” County Law § 500(1). The question is whether the county attorney's term of office is measured by the term of individual legislators or by the term of the collective entity that appointed him. While the text may be amenable to either reading, we believe that the legislative history provides a clear answer.

Initially, the statute governing appointment of county attorney provided that “[t]he term of office of a county attorney . . . shall be two years.” Act of May 8, 1918, ch. 573, 1918 N.Y. Laws 1853, codified at County Law § 210 (McKinney 1939). This subsequently was amended to provide that the county legislature was authorized to appoint a county attorney “to act during the term of office for which the then members of such board were elected.” Act of Apr. 20, 1931, ch. 485, 1931 N.Y. Laws 1165, codified at County Law § 210 (McKinney 1939). The purpose of this amendment linking the county attorney's term to that of the county legislature was to “prevent

outgoing [county legislatures] from employing any attorney just before the close of their term for a period of two years thereafter.” Statement by Assemblyman Cornaire, *reprinted* in Bill Jacket for ch. 485 (1931), at 3. The justification for the amendment was that each county legislature “should be permitted to hire its own attorney in order to have one who will co-operate with the [county legislature] in their work.” *Id.* In the 1950 recodification of the County Law, the term-of-appointment language of what became § 500(1) was altered slightly (“to act during” the legislators’ term became the current “for” the legislators’ term) but with no indication that the meaning of this portion of the statute was intended to change. Act of Apr. 15, 1950, ch. 691, 1950 N.Y. Laws 1652.

But for the staggered terms of the County’s legislators, the answer to your question would be that the county attorney is appointed to serve the duration of the legislators’ four-year term. To reconcile the intent of the amendment to what is now County Law § 500 with the county legislators’ staggered terms, however, “term of office for which the then members of such board were elected” must be interpreted to mean the term of the county legislature as a board following a regularly-scheduled election at which a significant number of incumbent legislators are subject to replacement. After such an election, the county legislature, under common law principles, is a newly-constituted board. *See Matter of Harrison Cent. Sch. Dist. v. Nyquist*, 59 A.D.2d 434, 436 (3d Dep’t 1977) (when 1/3 membership of school board elected annually to three-year term, board’s appointment of school attorney to three-year term violated common law prohibition against binding successor board); Op. Att’y Gen. (Inf.) No. 90-50; *see also* V. Woerner, Annotation, *Power to Appoint Public Officer for Term Commencing at or after Expiration of Term of Appointing Officer or Body*, 75 A.L.R.2d 1277, at [4a] (1961) (stating that “courts deem[ed] the board as constituted after the expiration of a staggered term as being a new board, distinct from and a successor to the one as previously constituted”). It is the term of the county legislature as the governing body, rather than terms of the individual legislators comprising it, that, we believe, determines the duration of the appointed county attorney’s term.

We thus are of the opinion that the county legislature’s term, with its staggered four-year terms, is two years. Consequently, the county attorney’s term of appointment runs during the two-year term of the appointing county legislature.

With respect to a county attorney serving past the expiration of the appointing county legislature’s term, he properly is deemed a holdover under Public Officers Law § 5 and validly can continue to discharge the duties of his office until his successor is appointed and qualifies to take office. For the purpose of appointing his successor, the office is deemed vacant. Public Officers Law § 5.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD  
Assistant Solicitor General  
in Charge of Opinions