

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 18, 1989

Larry EchoHawk  
Bannock County Prosecuting Attorney  
Box Pocatello, Idaho 83201

### THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Meaning of the "full time" requirement, for certain prosecuting attorneys, contained in Idaho Code § 31-3113.

Dear Mr. EchoHawk:

This letter is in response to your inquiry concerning the application of Idaho Code § 31-3113. That statute requires the prosecuting attorneys of certain counties, including Bannock, to "devote full time to the discharge of their duties." You asked about the application of this requirement to certain outside activities that you were considering. These included delivering two speeches, for which you had been offered honoraria and the payment of expenses; acting as mediator in a dispute between the Tribal Police Department and the Tribal Court System for the Shoshone-Bannock Tribes, for which you had been offered compensation; and serving as an instructor at training sessions on Indian law issues. You wished to know whether the statute would prohibit your accepting compensation for the speeches, or your acting as a mediator or instructor. You also noted that you had interpreted the statute's "full time" requirement to mean that you should not conduct any private law practice and that you should work a minimum of 40 hours per week.

The specific activities that you asked about have probably already taken place. However, our advice may assist you in deciding whether to accept or retain any compensation for your services and may help guide you in the future. Your interpretation of the statute appears to be essentially correct. The requirement that a prosecuting attorney devote "full time" to his duties does not compel him to devote all of his hours to that job, nor does it exclude all outside activities. The statute does not prohibit the acceptance of compensation for the performance of other tasks. Although not specifically set forth in the statute, it was probably the intent of the legislature to prohibit the private practice of law by full-time prosecutors; it is certainly the better practice for full-time prosecutors to restrict their practice of law to their duties as prosecutors. The activities you describe do not fall within the definition of the "practice of law." Therefore, it would be proper for you to engage in them and accept compensation, so long as they do not interfere with your ability to substantially devote full time to your duties as prosecuting attorney.

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It may be helpful to break down the questions you submitted into three issues:

- (1) Does Idaho Code § 31-3113 prohibit a full-time prosecuting attorney from engaging in any other work?
- (2) Does the statute prohibit a full-time prosecuting attorney from accepting any compensation for outside work?
- (3) Does the statute prohibit a full-time prosecuting attorney from engaging in the private practice of law?

The analysis of each of these issues is made more difficult by the vagueness of the statute. Several other states have statutes that prohibit the outside practice of law by prosecutors, or that couple such a prohibition with a "full time" requirement. *See, e.g.*, Colo. Rev. Stat. § 20-1-301; Me. Rev. Stat. Ann. tit. 30, § 454; N.Y. County Law § 700(8). Cases interpreting these statutes have generally focused on the provision prohibiting the outside practice of law. *See*, Annot., 6 A.L.R.3d 562 (1966). No cases have been found interpreting the "full time" requirements of such statutes.

For guidance in addressing the first issue identified above, it is necessary to turn to cases interpreting a "full time" requirement in employment contracts. In *Harrison v. Lustra Corporation*, 84 Idaho 320, 372 P.2d 397 (1962), the appellant was a traveling salesman who was seeking worker's compensation for injuries received in a fall in a motel bathroom. He relied in part on a clause in his employment contract that stated that he "shall devote his full time and efforts to the sale of the products of the company." The court affirmed the denial of compensation. In interpreting the contested clause, the court stated:

Such provision is in its nature somewhat ambiguous, however it does not require the employee to devote 24 hours a day nor every minute of his waking hours to his employment. On the other hand, it undoubtedly does require that the employee shall make that employment his business to the exclusion of the conduct of other business such as usually calls for the substantial part of one's time or attention.

84 Idaho at 325.

Other courts have interpreted "full time" provisions in cases where it was alleged that an employee had violated the provision by engaging in outside activities. The language cited above from the *Harrison* case was drawn from the most often cited of these cases, *Johnson v. Stoughton Wagon Co.*, 95 N.W. 394 (Wis. 1903). There the court held that the plaintiff had not violated his contract

by acting as vice president of a bank, or by taking care of his mother's investments and the finances of another company. The court observed that "[i]t would be unfortunate indeed for the community if a line must be drawn so strictly that only people whose services were not needed in the conduct of important business could occupy such positions." 95 N.W. at 397. It went on to note that the plaintiff had "devoted more than ordinary business hours" to his employment, working nine hour days and about half of his evenings. *Id.*

Similarly, in *Long v. Forbes*, 136 P.2d 242 (Wyo. 1943), the court noted, "The cases seem to hold that full-time employment does not mean that the employee may not have some time that he may use in his personal affairs, or in other business, without breach of the employment contract." 136 P.2d at 246. And in *Trans-america Insurance v. Frost National Bank*, 501 S.W.2d 418 (Tex. Civ. App. 1973), the court approved a jury instruction which stated that "a party may substantially devote 'full time' to the performance of a given task without devoting literally all of his time to such work; but should he undertake other duties, of such a nature and to such an extent that such other duties interfere to any significant extent with such party's performance of the given task, he is no longer substantially devoting his full time to its performance." 501 S.W.2d at 423, n.1.

Applying these standards to the "full time" statutory provision, it seems reasonable to conclude that a full-time prosecutor may take on other tasks, so long as they do not interfere with the full time performance of his duties as prosecutor. Your adherence to a workweek of at least 40 hours, and avoidance of tasks that would interfere with this schedule, appears to be consistent with the statute. Certain types of tasks, such as acting as a state legislator, would impose too great a demand on a prosecutor's time and would make compliance with the "full time" requirement infeasible. *See*, Attorney General Opinion No. 86-6, *Annual Report* at 38. And as I am sure you know only too well, investigations and trials will sometimes require much more than 40 hours in a given week; it should not be assumed that the performance of a specified number of hours of work will always constitute compliance. A full-time prosecutor should avoid activities that would interfere with his devoting a normal workweek of approximately 40 hours to his job, or such additional hours as may be necessary to the performance of his duties.

With regard to the second issue, there appears to be no prohibition of a prosecutor's acceptance of reasonable compensation for outside activities. A helpful case in this regard is *Derting v. Walker*, 112 Idaho 1055, 739 P.2d 354 (1987). There the prosecuting attorney of Kootenai County had contracted to prosecute misdemeanors in various municipalities within his county. He had done so with the unanimous approval of the county commissioners, as required under Idaho Code § 31-3113. The issue was whether the prosecutor could retain a portion of the funds paid by the municipalities for the prosecution of misdemeanors, or whether

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all such funds had to be paid over to the county. The plaintiffs, in arguing that the prosecutor could not retain any of the money, relied upon article 18, §§ 7, 8 and 9 of the Idaho Constitution, which require county officers to turn over any “fees” in excess of their salaries or expenses to the county treasurer; they also cited the “full time” requirement of Idaho Code § 31-3113. The court rejected these arguments and upheld the lower court’s decision allowing the prosecutor to retain a portion of the funds. In addressing the constitutional argument, the court noted that the funds received by the prosecuting attorney for the prosecution of misdemeanors within cities “do not constitute fees in that context, nor are the monies received for the performance of the ‘duties’ of the office of prosecuting attorney. Rather, they are personal funds received in his capacity as a private individual for the performance of contractual obligations not relating to the duties of the office of prosecuting attorney.” 112 Idaho at 1057. The court also rejected the argument that the “full time” provision of Idaho Code § 31-3113 made any monies received by a prosecutor the property of the county. 112 Idaho at 1058.

Of course, in *Derting v. Walker*, the court was addressing the issue of the disposition of funds received under a specific statutory exception to the “full time” requirement. However, the same reasoning would appear to be applicable to funds received by a prosecutor as a result of any permissible outside activity. Such funds, if received by the prosecutor for the performance of duties not relating to his office, are his personal property; the applicable constitutional and statutory provisions contain no restriction on the acceptance of such funds, nor any requirement that they be turned over to the county.

Finally, it should be noted that, although the statute contains no explicit provision prohibiting the private practice of law, it may well have been the intent of the legislature to prevent such outside practice. The court’s opinion in *Derting v. Walker*, *supra*, contained the following passage:

Until relatively recent times the office of county prosecutor has been part-time in nature. It is common knowledge, and we take judicial notice of the fact, that county prosecutors maintain private law practices in addition to their duties in prosecuting criminal offenses. When the legislature provided for “full time” prosecutors in certain counties, it made clear that in such counties the prosecutors were permitted to enter into contracts with municipalities for the prosecution of city misdemeanors.

112 Idaho at 1058.

Implicit in this language appears to be an assumption that the “full time” requirement of Idaho Code § 31-3113 ended the ability of the prosecuting attorneys in the designated counties to engage in private practice. (It is interesting to note

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that one of the dissenting justices was more explicit, stating that a full-time prosecutor “cannot enjoy the benefits of a private legal practice.” 112 Idaho at 1059. (Bistline, J., dissenting.) The assumption may have been based upon the doctrine of “expressio unius est exclusio alterius” — the expression of one thing is the exclusion of others. *See*, 2A Sands, *Sutherland Statutory Construction*, § 47.23 (4th ed. 1984). The provision that a prosecuting attorney may agree to prosecute city misdemeanors with the unanimous approval of the county commissioners may be viewed as excluding entirely any other outside practice of law. Although the statute is unclear in this regard, it is the better practice for full-time prosecutors to avoid the private practice of law.

The outside activities you have asked about do not appear to fall within the definition of the practice of law. Idaho courts have defined that term as follows:

The practice of law as generally understood, is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure. But in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.

*Idaho State Bar v. Meservy*, 80 Idaho 504, 508, 335 P.2d 62 (1959); *In re Matthews*, 57 Idaho 75, 83, 62 P.2d 578 (1936).

The Idaho State Bar has defined “practice of law” as follows:

“Practice of law” means active practice of law after admission to the Bar in this or another jurisdiction as a:

- (1) Partner or associate of a private or public law firm;
- (2) Legal officer of a corporation or other business organization;
- (3) Government employee whose duties are primarily providing legal advice to the governmental agency by which he or she is employed or representing such governmental agency before the courts;
- (4) Legal officer in the Armed Services;
- (5) Judge, lawyer magistrate, administrative judge or referee, or law clerk to a judge or a court of general or appellate jurisdiction of any state or federal court in the United States; or
- (6) Full-time teacher in a law school approved by the Section on Legal Education and Admission to the Bar or the American Bar Association.

*Bar Commission Rules Governing Admission to Practice and Membership in the Idaho State Bar*, Rule 200(j).

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Speaking, mediation, and instruction on a part-time basis would not appear to fall within these definitions. Of course, you would be using your training and experience as a lawyer in performing these functions. However, the incidental use of legal knowledge in a service that is primarily nonlegal does not constitute the practice of law. *Auerbacher v. Wood*, 59 A.2d 863 (N.J. 1948).

In summary, a prosecuting attorney who is required to devote full time to the discharge of his duties under Idaho Code § 31-3113 may safely comply with the statute by (1) avoiding outside activities that would interfere with his working a full workweek of approximately 40 hours, and such additional hours as his duties may require, and (2) refraining from the private practice of law. Your proposed activities as speaker, instructor, and mediator would be proper so long as they do not interfere with your performance of your duties. The acceptance of reasonable compensation for these activities is not prohibited.

Please contact me if you have any additional questions on this matter.

Sincerely,

Michael A. Henderson  
Deputy Attorney General  
Criminal Law Division