

ATTORNEY GENERAL OPINION NO. 92-2

TO: Craig Mosman
Latah County Prosecuting Attorney
Courthouse
Moscow, ID 83843

Per Request for Attorney General's Opinion

QUESTION PRESENTED

You are currently the elected prosecuting attorney for Latah County. In addition, you have entered into a contract with the Board of County Commissioners for Benewah County to perform the duties of prosecuting attorney for that county. Two questions arise as a result of this contract:

1. Is your performance of the duties of prosecuting attorney for Benewah County consistent with the requirement of Idaho Code § 31-3113 that you devote full time to the discharge of your duties as prosecuting attorney for Latah County?
2. Is your performance of the duties of prosecuting attorney for Benewah County consistent with Idaho Code § 31-2601, which states that, with certain exceptions, "[n]o prosecuting attorney shall hold any other county or state office during his term of office as prosecuting attorney"?

CONCLUSION

1. Your contract to perform the duties of prosecuting attorney for Benewah County does violate the provision of Idaho Code § 31-3113 requiring you to devote "full time" to your duties as prosecuting attorney for Latah County because it represents the private practice of law.
2. In light of our answer to Question 1 above, we do not address the question whether your contract with Benewah County to perform the duties of prosecuting attorney violates the multiple-office holding prohibition of Idaho Code § 31-2601.

BACKGROUND

The contract at issue here was entered into under Idaho Code § 59-907, enacted in 1988. The statute provides as follows:

In the event a vacancy exists and there is no resident attorney in the county who is willing or qualified to perform the functions of prosecuting attorney as set forth in chapter 26, title 31, Idaho Code, the board of county commissioners may appoint and/or contract with an attorney from outside the county to perform the duties of prosecuting attorney for the balance of the unexpired term or such shorter period as the board of county commissioners shall determine. (Emphasis added.)

The contract recites that Jack B. Britton, the elected prosecuting attorney for Benewah County, submitted his resignation on or about June 1, 1992, with an effective date of June 30, 1992. The commissioners then notified the Republican Central Committee of the resignation. The committee later notified the commissioners that it was unable to locate any interested candidates for appointment "and had no nominations to submit to the Commissioners for consideration pursuant to Idaho Code § 59-906." It appeared to the commissioners that "no resident attorney was interested, willing or available to perform the functions of Prosecuting Attorney in and for Benewah County."

Therefore, under the provisions of Idaho Code § 59-907, the commissioners entered into a contract with Craig Mosman and Roy Mosman "to perform the duties of Benewah County Prosecuting Attorney." The contract requires "Craig Mosman to serve in the capacity of Prosecuting Attorney" It provides for compensation to be paid jointly to Craig Mosman and Roy Mosman on a monthly basis. The contract runs through the second Monday of January, 1993—Mr. Britton's unexpired term—"unless earlier terminated by mutual agreement of all parties."

ANALYSIS

1. The "Full Time" Provision of Idaho Code § 31-3113

Idaho Code § 31-3113 requires the prosecuting attorneys of certain counties—including Latah County, but not including Benewah County—"to devote full time to the discharge of their duties." The first question to be addressed is whether the contract to perform the duties of prosecuting attorney for Benewah County violates the statute's requirement that you devote full time to the discharge of your duties as Latah County prosecuting attorney.

At the outset, we note that reasonable minds can differ on the answer to this question. The Idaho Legislature has not seen fit to couple the "full time" requirement of Idaho Code § 31-3113 with a clear prohibition against the outside practice of law by prosecutors. Idaho Code § 31-3113 is silent on the question of the outside or private practice of law. As the statutory provisions from other states amply illustrate, it is a simple matter for a legislature to state, expressly and clearly, that a prosecutor shall not engage in the private practice of law. *See, e.g.*, Ala. Code § 12-17-184; Colo. Rev. Stat.

§ 20-1-301; Conn. Gen. Stat. Ann. § 51-278; Ind. Code § 33-14-7-19.5; Kan. Stat. Ann. § 22a-106; Mass. Gen. L. ch. 12, § 15; Miss. Code Ann. § 25-31-37; N.Y. County Law § 700(8); N.C. Gen. Stat. § 7A-61; Okla. Stat. tit. 19, § 215.28; Pa. Stat. Ann. tit. 16, § 1401; Tenn. Code Ann. § 8-7-201; Wyo. Stat. § 9-1-802; *see also*, W. Va. Code § 7-7-4 (requiring prosecutor to devote "full time to his public duties to the exclusion of any other employment").

We note in this regard that two years before the adoption of the full-time requirement in 1976, the legislature had considered a bill providing that prosecuting attorneys making at least \$18,500 per year "shall devote their entire time to the performance of their official duties, and shall be prohibited from the private practice of law during their term of office as prosecuting attorney." (Emphasis added.) The bill passed in the house of representatives, but was never brought to a vote in the senate. 1974 Idaho House Journal, 104, 235; 1974 Idaho Senate Journal, 206.

We are also aware that at least one case supports the proposition that a "full time" requirement may be met while at the same time engaging in the outside practice of law. In West Virginia Judicial Inquiry Commission v. Allamong, 252 S.E.2d 159 (W. Va. 1979), it was alleged that a magistrate had engaged in misconduct by practicing law. It was asserted that such practice was prohibited by a statute that required the magistrate to "devote full time to his public duties." The court contrasted this language with the clear statutory requirement that the prosecuting attorney in certain West Virginia counties must "devote full time to his public duties to the exclusion of any other employment." W. Va. Code § 7-7-4. In that statute, according to the West Virginia court, the legislature had "expressed its intent in clear and unequivocal language" 252 S.E.2d at 163, n.7. The court refused to read a similar limitation on outside activity, including the private practice of law, into the general "full time" requirement for magistrates.

Despite this authority to the contrary, we continue to adhere to the principles enunciated in previous opinions of this Office regarding the "full time" requirement of Idaho Code § 31-3113. In particular we draw upon an informal guideline letter of April 18, 1989. Idaho Attorney General's Annual Report, pp. 144-49 (1989). While your situation is different in significant respects, much of the analysis contained in that letter is applicable here.

The guideline noted that cases dealing with the outside practice of law by prosecutors have focused exclusively on statutory provisions expressly prohibiting the outside practice of law, not provisions dealing with "full time" performance of one's duties as a prosecutor. *See*, Annot., Constitutionality and Construction of Statute Prohibiting a Prosecuting Attorney from Engaging in the Private Practice of Law, 6 A.L.R.3d 562 (1966). We therefore find it 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 Idaho Supreme Court said:

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 stated, "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 Transamerica 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.

In short, the term "full time" results in a rule of reasonableness, not a bright line test. As applied to the requirement in Idaho Code § 31-3113 that the prosecutors in the eight counties so identified must "devote full time to the discharge of their duties," it obviously does not mean that they must devote every waking minute to their job or that they are forbidden to devote some time to their personal affairs, community service or outside business interests.

On the other hand, the "full time" requirement of Idaho Code § 31-3113 does mean that the prosecuting attorney must make that job his business to the exclusion of any other business that would call for a substantial part of his time or attention, and must avoid any other duties that would interfere to any significant extent with the discharge of his duties as an elected prosecutor.

As noted earlier, this Office has construed the "full time" language of Idaho Code § 31-3113 on two previous occasions. In Attorney General Opinion No. 86-6, we addressed the question whether a prosecuting attorney could serve as a member of the Idaho Legislature. The question was answered by Idaho Code § 31-2601, which expressly forbids a prosecutor from holding any state office during his term of office as a prosecuting attorney. We went further, however, and took the additional step of stating that even if Idaho Code § 31-2601 had not been dispositive of the question:

It is our opinion that a prosecutor required to devote full time to the position of prosecuting attorney pursuant to Idaho Code § 31-3113 could not serve as a legislator. That statute mandates that the Bannock County Prosecutor devote full time to the performance of his official duties. We do not believe that a "full time" prosecutor could also serve as a "part-time" legislator given the time requirements imposed upon an Idaho legislator.

Attorney General Opinion No. 86-6, 1986 Annual Report at 39.

The Office of the Attorney General again had occasion to construe the "full time" language of Idaho Code § 31-3113 in the guideline letter mentioned earlier. By the time that letter was issued on April 18, 1989, the Idaho Supreme Court had construed the same language in Derting v. Walker, 112 Idaho 1055, 739 P.2d 354 (1987). The issue in that case was whether the prosecutor could retain part of the money generated by his contract work in prosecuting city misdemeanors. The court, in passing, noted:

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.

The court thus stopped short of expressly stating that the position of "full time" prosecutor completely forbade the private practice of law. But there would have been little reason for the court to take judicial notice of the fact that until relatively recent times the office of county prosecutor had been part-time in nature, with prosecutors maintaining private law practices on the side, if it did not intend to contrast that situation with the one now in place once the Idaho Legislature saw fit to designate certain counties as requiring the services of "full time" prosecutors.

We therefore concluded that, "[i]mplicit in this language [of the Idaho Supreme Court in *Derting v. Walker*] 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." 1989 Annual Report at 147.

The guideline letter noted yet a second basis for this conclusion. Idaho Code § 31-3113 contains one and only one exception¹ to the requirement that the designated prosecutors devote full time to the discharge of their duties:

With the unanimous approval of the board of county commissioners, and with the consent of the prosecuting attorney, the prosecuting attorney may contract with any city within the county to prosecute nonconflicting misdemeanors

We noted that under the ordinary principles of statutory construction, the legislature's decision to expressly provide for only one such exception to the "full time" requirement implies a legislative intent to exclude all others—"*expressio unius est exclusio alterius*."

¹ Idaho Code § 31-2603 does mention situations in which the district court may appoint "some suitable person" to perform the duties of prosecuting attorney or, with the concurrence of the attorney general, to serve as a special assistant attorney general. In practice, the person chosen is frequently another prosecuting attorney, sometimes one who holds office in a "full time" prosecutor county. The full-time prosecutor may assist in emergency situations when another prosecutor has a conflict or is otherwise absent from his office. It should not be undertaken, however, if the temporary appointment interferes with the prosecutor's full-time commitment to his own elected office.

See, 2A Sands, Sutherland Statutory Construction § 47.23 (4th ed. 1984). We therefore concluded:

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.

1989 Annual Report at 148.

Any other interpretation would lead to odd results. The full time county prosecuting attorney would have to gain unanimous approval of the county commissioners to prosecute misdemeanors for cities in his or her own county, but would need no approval at all to engage in potentially far more demanding, time-consuming and conflicting duties as a private practitioner, as a prosecutor in another county or as a prosecutor of misdemeanors in cities in another county. We do not believe the Idaho Legislature could have intended this result when it created the narrow exception of city misdemeanor practice to the otherwise "full time" requirement for prosecutors in those counties designated in Idaho Code § 31-3113.

We note further that the legislature has seen fit to limit a full-time prosecuting attorney's city practice to city misdemeanors. We find it significant that this exception is in the criminal, not the civil arena, where conflicts between a city and a county might more easily arise.

Finally, we note that the majority opinion in Derting v. Walker took pains to point out that the prosecutor in that case had reimbursed the county for the inevitable use of county facilities in prosecuting city misdemeanors, had reimbursed his own deputies for the inevitable workload increase they sustained as a result of the city misdemeanor practice, and had turned over to the county general fund a percentage of the contract monies received. *Id.*, 112 Idaho at 1058. Again, it would be odd to allow county commissioners to impose such tight controls on the case of city misdemeanor practice within the prosecutor's own county and to allow them no voice whatsoever if the prosecutor chooses to prosecute misdemeanors in another county or to perform the duties of prosecuting attorney in another county.

Our 1989 guideline letter concluded that the prosecutor could engage in occasional public speeches, mediations and instruction without impinging on the requirement that he devote full time to the discharge of his duties as a prosecuting attorney. We cautioned, however, that even a commitment that he work a minimum of

40 hours per week would not always suffice to fulfill the "full time" requirement as a prosecutor:

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 work week of approximately 40 hours to his job, or such additional hours as may be necessary to the performance of his duties.

We concluded the guideline letter with the following 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.

We do not have sufficient information to determine "in fact" whether the performance of your duties for Benewah County will interfere with your full-time responsibilities as Latah County Prosecuting Attorney. Benewah County is not among the largest counties in Idaho; neither is it among the smallest. The county seat in Benewah County is not the most far flung from the Latah County Seat; neither is it the most conveniently located. The criminal responsibilities of a prosecuting attorney are relatively unpredictable since it is not possible to determine the occurrence of the next murder case, or the number and complexity of other criminal cases that may demand prosecution in either Benewah or Latah County. Although normally more predictable, even the time commitment to fulfill the civil responsibilities of the county prosecuting attorney's office can vary substantially.

Therefore, we cannot state with factual certainty that your contractual duties for Benewah County will or will not interfere with your full-time responsibilities with Latah County. However, we do believe there is a strong likelihood that the duties in Benewah County would interfere with your ability to provide full-time service in Latah County.

The second admonition contained in the 1989 guideline is that a full-time prosecuting attorney should refrain from the private practice of law. This second admonition is more troublesome in your context. Although we do not have the factual information to determine whether your contract with Benewah County will interfere with your full-time duties as Latah County Prosecutor, it is clear that your agreement with

Benewah County represents the private practice of law. Your contract with Benewah County is in your capacity as a private attorney and has no relationship to your position as the elected prosecutor for Latah County. The compensation you receive from Benewah County is paid to you as a private individual and does not constitute payment or reimbursement to Latah County.² Based upon our analysis, it is our opinion that the legislature intended to prohibit the private practice of law on the part of those prosecutors who are required by Idaho Code § 31-3113 to devote their full time to their elected office.

We therefore conclude that your contract to perform the duties of the Benewah County Prosecuting Attorney does violate the requirement of Idaho Code § 31-3113 that you devote full time to the discharge of your duties as the elected prosecuting attorney of Latah County because it represents the private practice of law.

2. The Prohibition of Multiple-Office Holding of Idaho Code § 31-2601

The second question asks whether your contract to perform the duties of prosecuting attorney in Benewah County would violate the provision of Idaho Code § 31-2601, which states: "No prosecuting attorney shall hold any other county or state office during his term of office as prosecuting attorney" A resolution to this question would require a determination of whether you are now holding office as prosecuting attorney of Benewah County or are merely contracting to perform the duties of prosecuting attorney for that county.

In light of our answer to the first question regarding the "full time" requirement of Idaho Code § 31-3113, we do not reach this question. Suffice it to say that we are aware of Idaho Code § 59-907 and its provision that upon a vacancy in the office of the prosecuting attorney, where no resident attorney is willing to "perform the functions of

² This is contrasted with the existing practice of prosecutorial assistance under Idaho Code § 31-2603. That statute provides the legal authority to an elected prosecutor to provide prosecutorial assistance, either as a special prosecuting attorney or special deputy attorney general, to another county. Traditionally these appointments have been for a specific criminal case and no private remuneration is paid by the requesting county to the special prosecuting attorney or special deputy attorney general. The normal practice is for the requesting county to pay out-of-pocket expenses to either the state or county as the employer of the attorney providing the prosecutorial assistance.

prosecuting attorney . . . the board of county commissioners may appoint and/or contract with an attorney from outside the county" (Emphasis added.) We read that statute as providing the general mechanisms whereby county commissioners may fill a vacancy, not as overriding the specific requirement of Idaho Code § 31-3113 that certain designated prosecutors must devote full time to their duties as county prosecutors.

SUMMARY

In sum, it is our conclusion that the "full time" requirement of Idaho Code § 31-3113 prevents a full-time prosecuting attorney to contract as a private attorney to perform the ongoing statutory duties of prosecuting attorney in a second county.

AUTHORITIES CONSIDERED

1. State Statutes:

Ala. Code § 12-17-184

Colo. Rev. Stat. § 20-1-301

Conn. Gen. Stat. Ann. § 51-278

Idaho Code ch. 26, tit. 31

Idaho Code § 31-2601

Idaho Code § 31-2603

Idaho Code § 31-3113

Idaho Code § 59-906

Idaho Code § 59-907

Ind. Code § 33-14-7-19.5

Kan. Stat. Ann. § 22a-106

Mass. Gen. L. ch. 12, § 15

Miss. Code Ann. § 25-31-37

N.C. Gen. Stat. § 7A-61

N.Y. County Law § 700(8)

Okla. Stat. tit. 19, § 215.28

Pa. Stat. Ann. tit. 16, § 1401

Tenn. Code Ann. § 8-7-201

W. Va. Code § 7-7-4

Wyo. Stat. § 9-1-802

2. Idaho Cases :

Derting v. Walker, 112 Idaho 1055, 739 P.2d 354 (1987)

Harrison v. Lustra Corporation, 84 Idaho 320, 372 P.2d 397 (1962)

3. Other Cases :

Johnson v. Stoughton Wagon Co., 95 N.W. 294 (Wis. 1903)

Long v. Forbes, 136 P.2d 242 (Wyo. 1943)

Transamerica Insurance v. Frost National Bank, 501 S.W.2d 418 (Tex. Civ. App. 1973)

West Virginia Judicial Inquiry Commission v. Allamong, 252 S.E.2d 159 (W. Va. 1979)

4. Other Authorities:

Informal Guideline Letter (April 18, 1989), 1989 Annual Report at 147-148

Attorney General Opinion No. 86-6, 1986 Annual Report at 39

Constitutionality and Construction of Statute Prohibiting a Prosecuting Attorney from Engaging in the Private Practice of Law, 6 A.L.R. 3d 562 (1966)

1974 Idaho House Journal, 104, 235

1974 Idaho Senate Journal, 206

2A Sands, Sutherland Statutory Construction, 47.23 (4th ed. 1984)

DATED this 14th day of October, 1992.

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