ATTORNEY GENERAL OPINION NO. 93-8

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Per Requests for Attorney General's Opinion

QUESTION PRESENTED

Do county commissioners have the ability to retain civil counsel outside the county prosecutor's office on a long-term or continuous basis?

CONCLUSION

1. Pursuant to the Idaho Constitution, statutes and case law, county commissioners do not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity."

2. It is the county prosecutor's duty to try civil matters in which the county is a party and give the board legal advice. Before the board of county commissioners may hire private counsel, the board must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. It must also make these reasons a matter of record and this factual justification is reviewable by the courts of this state. Mere comfort level or convenience does not rise to the level of "necessary" in this context.

3. The duty of a prosecutor "to prosecute or defend all civil actions in which his or her county is a party," pursuant to Idaho Code § 31-2604, supersedes the power of the county commissioners "to hire counsel with or without the prosecutor" granted by Idaho Code § 31-813.

ANALYSIS

Your opinion request concerns the ability of the Bonneville and Kootenai County commissioners to employ, on a retained basis, a private civil attorney not affiliated with the duly elected county prosecutor. Art. 18, sec. 6, of the Idaho Constitution places a limitation on the discretion of a board of county commissioners and allows it to hire counsel only when the circumstances warrant such action.

1. The Plain Meaning of Art. 18, Sec. 6, of the Idaho Constitution

Since statehood, art. 18, sec. 6, of the Idaho Constitution has provided the board of county commissioners with the ability to hire counsel when special circumstances arise. Art. 18, sec. 6, reads, in pertinent part: "The county commissioners may employ counsel *when necessary.*" (Emphasis added.)

The Idaho Supreme Court has held that the rules of statutory construction apply to constitutional provisions. Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). A fundamental rule of statutory and constitutional construction is if a statute or constitutional provision is not ambiguous, the language will be given its plain and ordinary meaning. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991). By this notion, the plain meaning of the word "necessary" is presumed to be the meaning given to it in common parlance. The term "necessary" has been defined as follows:[1]

> An indispensable item; essential; absolutely needed; required. Webster's New Collegiate Dictionary 790 (9th ed. 1991).

The term "necessity" is defined as:

> The quality of being necessary; pressure of circumstance; physical or moral compulsion; impossibility of a contrary order or condition; the quality or state of being in need. Webster's New Collegiate Dictionary 790 (9th ed. 1991).

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[1] The definition of "necessary" in Black's Law Dictionary reads:

> This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. . . ." Black's Law Dictionary 1029 (6th ed. 1990).

This is the only definition which creates an issue of ambiguity. It indicates that the meaning of the word is controlled by the context in which it is used. The constitutional context in which art. 18, sec. 6, was adopted indicates that when the framers incorporated the "necessary" standard into the constitution they had in mind exigent or special circumstances. The case law has also interpreted the necessary standard to be much more than mere convenience.

> Controlling force; irresistible compulsion; a power or impulse so great that it admits no choice of conduct; a condition arising out of circumstances that compel a certain course of action. Black's Law Dictionary 1030 (6th ed. 1990).

These entries indicate that the words "when necessary" are words of limitation as used in the constitution. Given their natural significance these words bridle the discretion of county commissioners when they are considering hiring private counsel. Thus, it is the opinion of this office that mere convenience or personal preference does not rise to the level of "necessary" or "necessity" in this context.

2. Case Interpretation of Art. 18, Sec. 6

There are several Idaho Supreme Court cases which have interpreted the language of art. 18, sec. 6, of the Idaho Constitution. The first was Meller v. Board of Commissioners of Logan County, 4 Idaho 44, 35 P. 712 (1894). In Meller, the board of county commissioners for Logan County entered into a contract in which it retained H.S. Hampton, a private attorney, to provide legal services to the county at $2,000 per year for a two year period. The supreme court held that the board had gone beyond the scope of its constitutional and statutory authority by hiring private counsel. The court therefore found the contract in question to be void and a nullity, and in so holding stated:

> We are unwilling to believe that it was the purpose of the framers of our constitution to "pluck the muzzle of restraint" from the boards of county commissioners throughout the state, and leave them with the sole limit of the vagaries of their own sweet wills in imposing burdens upon the taxpayers of the state.

4 Idaho at 51. It is clear from this language that the court intended to limit the discretion of county commissioners in hiring counsel to something narrower than the "vagaries of their own sweet wills." The court also found that "the Legislature cannot take from a constitutional officer a portion of the characteristic duties belonging to the office, and devolve them on an office of its own creation. And if this cannot be done by the Legislature, will it seriously be contended that it can be done by a board of county commissioners?" *Id*. The supreme court went on to set forth the standard under which boards of county commissioners could hire counsel. It stated that "the board of county commissioners may, when the *necessity* exists, employ counsel, but that necessity must be apparent, and the action of the board in each case is subject to review by the courts." *Id.* at 53 (emphasis added).

Two years later the supreme court decided Hampton v. Commissioners of Logan County, 4 Idaho 646, 43 P. 324 (1896). The same facts that gave rise to the decision in Meller were at issue here. After the Meller decision was handed down, H.S. Hampton, the attorney who was retained under the void contract, presented an itemized bill for his services to the Logan County commissioners. The board refused to pay the bill and Mr. Hampton appealed this decision to the district court which decided he was entitled to $832 on a *quantum meruit* basis. In holding that Hampton was entitled to nothing, the supreme court opined that "before the authority given to the county commissioners by section 6, article 18 of the constitution can be exercised, the necessity which authorizes it must not only be apparent, but the facts creating such necessity must be made *a matter of record by the board*." Hampton, 4 Idaho at 652 (emphasis added). This holding has become the controlling standard in construing the language of art. 18, sec. 6, which relates to commissioners' ability to hire private counsel.

The next case to apply the Hampton "necessity" standard was Ravenscraft v. Board of Commissioners of Blaine County, 5 Idaho 178, 47 P. 942 (1897). In this case the board of Blaine County had hired a private firm to defend a *single* suit in which the constitutionality of the act creating Blaine County was challenged. Before hiring the private firm, the board of commissioners had first made a matter of record the circumstances which gave rise to its decision to retain private counsel. Because of the magnitude of the legal crisis facing Blaine County, the supreme court held the record contained "the facts creating the necessity for the employment of counsel by the board of commissioners of Blaine County." *Id.* at 183. Once again the Hampton "necessity" standard controlled the inquiry and was satisfied only because the Blaine County board had made an official record of the compelling facts which justified their actions to retain private counsel to defend the county in a single lawsuit.

A similar factual situation was at issue in Barnard v. Young, 43 Idaho 382, 251 P. 1054 (1926). In this case the Power County Board of Commissioners hired private counsel on a contingent fee basis to assist the prosecuting attorney in collecting deposits from several bondsmen for deposits of county money in closed banks. The supreme court followed the principle laid down in Hampton and held: "[B]y the constitution, section 6, art. 18, county commissioners are expressly empowered to employ counsel in civil cases when necessary" Barnard, 43 Idaho at 386. The court went on to conclude that the board had satisfied the necessity standard set forth in Hampton in hiring private counsel for this matter because the commissioners had identified on the record the facts which created the need for such counsel before retaining the attorney. It should be noted that the Power County board in Barnard hired counsel for a single legal issue.

In Anderson v. Shoshone County, 6 Idaho 76, 53 P. 105 (1898), the Idaho Supreme Court found that a contract for legal services between the board of

commissioners of Shoshone County and a private attorney was valid. However, in coming to its conclusion, the court stated: "It is not contended by respondent that no necessity for the employment of counsel existed, nor that the same is not made apparent by the records of the board." *Id.* at 77. It also opined that "it seems to us this objection should more properly come from the district attorney himself, but that officer does not seem to have considered himself especially aggrieved by the action of the board; at least, he has made no moan apparent in the record." *Id.* It should also be noted that the respondent cited no relevant cases to support his contention that the board had no authority to employ counsel.

The most recent published case construing the constitutionally granted power of commissioners to hire counsel when necessary was decided in 1932. Clayton v. Barnes, 52 Idaho 418, 16 P.2d 1056 (1932). In this case the court found that "section 6 article 18, in providing that the county commissioners may employ counsel when necessary, *is a limitation upon the authority of the county commissioners to employ counsel* and a denial of the authority of all other county officials to do so." *Id.* at 424 (emphasis added). [2]

Since the adoption of the constitution of Idaho, there have been only three instances where the Supreme Court of Idaho has upheld a board of county commissioners' decision to hire private counsel. All three are distinguishable from the situations in Kootenai and Bonneville counties. In Anderson v. Shoshone County, the respondent neither asserted that the board had failed to meet the necessity standard nor did he contend the board lacked factual justification for its action. The respondent in that case did not present a single cognizable argument to support his position. Thus, the supreme court ruled in favor of the validity of the board's action. The court did, however, state that the proper person to bring such a complaint was the district attorney. In Ravenscraft, the very existence of Blaine County was at stake and the court held that the necessity standard had been met because of the obvious importance of this crisis. Ravenscraft also only involved the ability of the Blaine County board to hire outside counsel to handle only one case. Barnard is distinguishable on the same grounds, namely that the Power County board hired outside counsel for a specific legal problem and not on a retained or continuous basis. The boards in Ravenscraft and Barnard also made a record of the factual justification for hiring private counsel.

The situations in Bonneville and Kootenai counties are most closely analogous to the facts of Meller and Hampton where the Logan County board attempted to retain private civil counsel, not for a specific case, but rather on a two year retained basis at a fixed salary. The supreme court ruled that this affiliation was impermissible.

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[2] The holding in Clayton makes it apparent that the conclusion reached in AG opinion 76-42, that "administrative boards [created by the board of county commissioners] have the right to hire counsel," is incorrect.

After a thorough examination of the constitution and all relevant case law, this office concludes that county commissioners do not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity." Before a board of county commissioners may hire private counsel, it must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. The board must also make these factual justifications a matter of record and that record is reviewable by the courts of this state.

3. Proceedings at the Constitutional Convention

Assuming that the language of art. 18, sec. 6, is subject to more than one reasonable interpretation, the intent and purpose of the framers controls the provision's meaning. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991). It is helpful to look at the context in which this provision was adopted to glean the intent and purpose of its drafters. The proceedings at the Constitutional Convention in 1889 provide insight into what the framers intended in enacting the language, "county commissioners may hire counsel when necessary."

Some historical background is necessary to provide insight into what occurred at the convention proceedings. From the organization of Idaho as a territory in 1863 to 1883, a system of district attorneys was employed. There was one district attorney for each judicial district. In 1883 the existing system was modified and provided a county attorney for each of the seventeen counties. Meller v. Board of Commissioners of Logan County, 4 Idaho 44. Upon statehood, the framers expressly rejected the county attorney format and opted for district attorneys. At statehood there were only five judicial districts, comprised of multiple counties. The framers' obvious motive in adopting the district attorney system was to save money. At the Convention, delegate Reid stated:

> The district attorneys cost this territory now $36,600. We have five district attorneys already provided for and have fixed their salaries at $2,500. That makes $7,500, which is a saving on that item of $29,000 to the people.

Proceedings of the Idaho Constitutional Convention of 1889 at 1821 (Hart ed. 1912). During the same discussion, the framers decided to adopt the language which allows the commissioners to "hire counsel when necessary." There was much discussion about giving the commissioners unbridled discretion to hire counsel at any price they deemed prudent. In adopting the current language, the following discussion ensued:

> Mr. Reid: If the county has an important suit or has important legal business, the commissioners ought to be allowed to go into the market and get the best legal talent; and if they do not have the business they do not have to have to have [sic] the counsel.
>
> Mr. Beatty: Suppose an important murder case has to be prosecuted before the committing magistrate?
>
> Mr. Reid: There is the district attorney who is already paid by the state to do that.
>
> Mr. Beatty: But he is off in some other county.
>
> Mr. Reid: I have seen this very system, and if it be necessary, the chairman of the board is always on hand, and upon application to him, when he sees public justice is about to fail, he can employ a man.

Id. at 1822. It is apparent from this debate that the framers granted the commissioners the ability to hire counsel when the district attorney was unavailable or when circumstances indicated that such counsel was absolutely needed, for example, when "public justice is about to fail."[3]

Thus, the proceedings at the Constitutional Convention further bolster the conclusion that the framers only intended to give county commissioners the ability to hire private counsel in emergency or special circumstances. This intention controls the meaning of the words "when necessary" if they are deemed to be ambiguous.

4. Statutory Duties of County Commissioners and Prosecutors

In addition to the constitutional provision, there are three statutes that relate to this issue. Idaho Code § 31-813 relates to the power of the county commissioners to hire counsel. It reads:

> 31-813. **Control of suits.-** To direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the prosecuting attorney, as they may direct.

[3] The district attorney system was ultimately abandoned by returning to the county prosecutor format in 1897 by constitutional amendment. Since the framers adopted the "necessity" language of art. 18, sec. 6, expressly with a five member district attorney system in mind, it would appear that a board of county commissioners would be held to a more exacting "necessity" standard since there are now forty-four county prosecutors.

(Emphasis added.) The Idaho statute which enumerates the duties of the prosecuting attorney reads as follows:

> 31-2604. **Duties of prosecuting attorney.-** It is the duty of the prosecuting attorney:
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> 1. To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people, or the state, or the county, are interested, or are a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county.
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> 2. . . . to prosecute or defend all civil actions in which the county or state is interested . . . .
>
> 3. To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers.

(Emphasis added.) In addition, Idaho Code § 31-2607 provides as follows:

> 31-2607. **Adviser of county commissioners.-** The prosecuting attorney is the legal adviser of the board of commissioners; he must attend their meetings when required, and must attend and oppose all claims and accounts against the county when he deems them unjust or illegal.

(Emphasis added.)

It is not immediately clear how these statutes should be reconciled. On the one hand, Idaho Code § 31-813 authorizes the county commissioners to "employ counsel" to prosecute and defend all suits "with or without the prosecuting attorney, as they may direct." On the other hand, Idaho Code § 31-2604 twice makes it the duty of the prosecuting attorney "to prosecute and defend all civil actions" in which the county is interested. Similarly, Idaho Code § 31-2607 makes the prosecuting attorney "the legal adviser of the board of county commissioners."

Fortunately, the apparent conflict between these statutes has been resolved by the Idaho Supreme Court in Conger v. Commissioners of Latah County, 5 Idaho 347, 48 P. 1064 (1897). In holding that the board had no authority to hire counsel in any criminal

case, the court discussed § 1759 Revised Statutes of the Territory of Idaho (1887), which is identical to and the predecessor of current Idaho Code § 31-813. In construing this statute the court stated "said provision was in force prior to the adoption of our state constitution and prior to the admission of Idaho into the Union." Conger, 5 Idaho at 352. The court then discussed the predecessor statute to Idaho Code § 31-2604, § 2052 Revised Statutes of Idaho, amended in 1891. This provision has, in relevant part, remained unchanged. In reference to the apparent conflict between the two statutes, the court stated:

> Some of the provisions of that section [§ 2052 Revised Statutes] are repugnant to the provisions of . . . section 1759 of the Revised Statutes, in that they make it the duty of the district attorney to prosecute or defend in all cases when a county of his district is an interested party, while the provisions of [section 1759] authorize the board to employ counsel to conduct such cases with or without the district attorney, as they may direct. If there is a conflict, as suggested, the latest expression of the legislative will must control.

Conger at 354. The court then went on to find that the board had no jurisdiction or control over criminal matters.

Thus, the discussion in Conger makes clear that where the duties of prosecutors, embodied in Idaho Code § 31-2604, and the duties and powers of county commissioners, contained in Idaho Code § 31-813, conflict, the more recently enacted expression of legislative will must control. As previously stated, the language of Idaho Code § 31-813 pre-dates the statehood of Idaho. R.S. § 1759 (1887). However, the predecessor to Idaho Code § 31-2604 was adopted four years later in the first legislative session in 1891. 1891 Sess. Laws, p. 47. Although the language which sets forth the duties of prosecutors is over one hundred years old, it is, compared to the duties and powers of county commissioners, "the latest expression of the legislative will" and, therefore, must control in the event of a conflict.

In short, a prosecutor's statutory duty "to prosecute or defend all civil actions" in which the county is a party supersedes the statutory ability of the county commissioners to hire counsel "with or without the prosecutor." The statutory duties of a prosecutor obviously do not supplant art. 18, sec. 6, of the Idaho Constitution. A board of county commissioners may still hire private counsel if they meet the constitutionally mandated necessity standard.

CONCLUSION

Based on the plain meaning of art. 18, sec. 6, of the Idaho Constitution, the Idaho Supreme Court cases construing this constitutional provision and the history of the statutes that prescribe the duties of prosecutors and commissioners, it is our conclusion that the board of county commissioners does not have the authority to hire civil counsel outside of the county prosecutor's office on a long-term or continuous basis unless they comply with Idaho's constitutionally mandated standard of "necessity." Before hiring outside counsel, the board must conduct a case-by-case analysis and state the facts which create the necessity of hiring such counsel. It must also make these reasons a matter of record and the facts made of record are reviewable by the courts of this state. Mere comfort level or convenience does not rise to the level of "necessity" in this context. In addition, the duty of a prosecutor "to prosecute or defend all civil actions in which his or her county is a party," pursuant to Idaho Code § 31-2604, supersedes the power of the county commissioners "to hire counsel with or without the prosecutor" granted by Idaho Code § 31-813.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. 18, sec. 6.

2. Idaho Statutes:

Idaho Code § 31-813.
Idaho Code § 31-2604.
Idaho Code § 31-2607.
1887 Revised Statutes §1759.
1890-91 Sess. Laws, p. 47.

3. Idaho Cases:

Anderson v. Shoshone County, 6 Idaho 76, 53 P. 105 (1898).

Barnard v. Young, 43 Idaho 382, 251 P. 1054 (1926).

Clayton v. Barnes, 52 Idaho 418, 16 P.2d 1056 (1932).

Conger v. Board of County Commissioners, 5 Idaho 347, 48 P. 1064 (1896).

Hampton v. Commissioners of Logan County, 4 Idaho 646, 43 P. 324 (1896).

Meller v. Board of County Commissioners, 4 Idaho 44, 35 P. 712 (1894).

Ravenscraft v. Board of Commissioners, 5 Idaho 178, 47 P. 942 (1897).

Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991).

Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990).

4. Other Authorities:

Proceedings of the Idaho Constitutional Convention of 1889 (Hart ed. 1912).

Black's Law Dictionary (6th ed. 1990).

Webster's New Collegiate Dictionary (9th ed. 1991).

DATED this 20th day of July, 1993.

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