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VOLUME NO. 45

OPINION NO. 14

ATTORNEYS - Full-time county attorney, attorney fees from private company for work on city/county bond issue;
ATTORNEYS' FEES - Full-time county attorney, fees from private company for work on city/county bond issue;
COUNTY ATTORNEYS - Full-time, attorney fees from private company for work on city/county bond issue;
MONTANA CODE ANNOTATED - Sections 7-4-2511(2), 7-4-2704, 7-4-2706, 7-4-4606;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 75 (1990).

HELD: A full-time county attorney serving as city attorney pursuant to an interlocal agreement may not personally receive attorney fees from a private company for work performed on a city/county bond issue.

October 14, 1993

Mr. John S. Forsythe
Rosebud County Attorney
Drawer 69
Forsyth, MT 59327-0069

Dear Mr. Forsythe:

You have requested my opinion on a question I have phrased as follows:

May a full-time county attorney serving as city attorney pursuant to an interlocal agreement receive a fee, in addition to his county attorney salary, for work performed on a city/county bond issue?

You are the full-time county attorney for Rosebud County. You have informed me that you are also acting as city attorney for the City of Forsyth pursuant to an interlocal agreement between the city and the county. The interlocal agreement provides that you will receive no salary in addition to your county attorney salary for your services as city attorney.

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You have attached to your request a copy of Resolution No. 1993-R3 wherein the Forsyth city council passed a resolution providing:

WHEREAS, the City of Forsyth, Rosebud County and Puget Sound Company have agreed to the sharing of the fee for the issuance of refunding bonds for Puget Sound Company in the amount of approximately \$23,460,000.00,

NOW THEREFORE BE IT RESOLVED that the fee rate of \$1.50/\$1,000.00 of bonds issued is hereby approved. The City of Forsyth and Rosebud County shall share equally (50/50) in said fee. Puget Sound Company will pay all attorney fees and out-of-pocket expenses necessarily incurred in connection with the bond issuance.

Although you receive no remuneration for acting as city attorney, the City has agreed to allow you personally to receive attorney fees from the Puget Sound Company for work performed on the bond issue.

Your status as a full-time county attorney compels me to conclude that you may not personally receive the attorney fees from the Puget Sound Company. Mont. Code Ann. § 7-4-2511(2) states:

No salaried county officer may receive for his own use any fees, penalties, or emoluments of any kind, except the salary as provided by law, for any official service rendered by him. Unless otherwise provided, all fees, penalties, and emoluments of every kind collected by a salaried county officer are for the sole use of the county and must be accounted for and paid to the county treasurer as provided by subsection (1) and credited to the general fund of the county.

In Platz v. Hamilton, 201 Mont. 184, 653 P.2d 144 (1982), the Montana Supreme Court held that the execution of passport applications, a function of the clerk of district court authorized by federal law, was not an official duty imposed upon a clerk of district court by state statute. The Court held that, since the legislature had not enacted a specific statute with regard to the disposition of the passport fees, the clerk could retain the fees for her personal use and was not required to remand them to the county general fund. Compare 43 Op. Att'y Gen. No. 75 (1990). If the law set forth in Platz were the only law applicable to your situation, the issue would be resolved by a determination of whether or not the legal services provided in connection with the city/county bond issue were outside the scope of a county attorney's legally prescribed duties.

However, another prohibition comes into play when analyzing fees paid to a full-time county attorney. Montana law specifically prohibits a full-time county attorney from engaging in the private practice of law or sharing directly or indirectly in the profits of any private practice of law, except for self-representation, or for a limited time following election or appointment to close an existing private practice. Mont. Code Ann. §§ 7-4-2704(2), -2704(4), and -2706 (1991).

In State v. Holman Aviation Co., 176 Mont. 31, 575 P.2d 923 (1978), the Montana Supreme Court, in an overtime wage claim case brought under the federal Fair Labor Standards Act, upheld a district court order and judgment awarding back wages and penalties, and \$100 in attorney fees to an aggrieved employee. The Court noted that the attorney fees "must be paid into the Cascade County general fund and not given to the Cascade County attorney as private attorney fees. Because Cascade County is a county with a population in excess of 30,000 people, the Cascade County attorney is prohibited from receiving profits from the private practice of law." 176 Mont. at 36, 575 P.2d at 926. This prohibition also applies to a full-time county attorney in a county with a population of less than 30,000. Mont. Code Ann. § 7-4-2706(1).

The statutory scheme is clear. In a county with a population in excess of 30,000, or in smaller counties where the office of county attorney is established as a full-time position pursuant to Mont. Code Ann. § 7-4-2706, the county attorney is required to devote full time to the discharge of his duties and he is to be paid by the county full-time pay for full-time work. In my opinion, the "private practice" generally prohibited by Mont. Code Ann. § 7-4-2704 encompasses any legal work performed by a full-time county attorney which is outside his official duties. Conversely, if the legal work is considered part of his official duties, a full-time county attorney may not accept a fee for the work because he may not receive any fees or emoluments of any kind, except the salary as provided by law, for any official service rendered by him.

Thus, it is my opinion that you may not personally retain the legal fees paid by the Puget Sound Company. If the services provided are beyond your "official duties" as county attorney, they constitute "private practice of law" from which you are prohibited by Mont. Code Ann. § 7-4-2704. If the services are part of your "official duties," your compensation for them is limited to your salary as county attorney, and any additional fees you receive must be paid over to the county under Mont. Code Ann. § 7-4-2511(2).

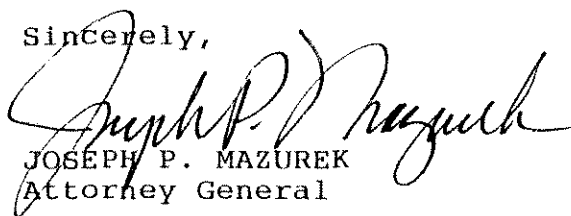
My opinion is unchanged by your status as city attorney for the City of Forsyth. It is true that a county attorney may be retained to provide legal services to a third-class city in certain cases. Mont. Code Ann. § 7-4-4606. However, the county attorney provides those services by virtue of his or her office as county attorney. The statute does not authorize the county attorney to contract with the city as a private attorney. See Mont. Code Ann. § 7-4-4606 ("A third class city may retain the county attorney to provide legal services . . . either by an interlocal cooperation agreement or by mutual consent by the governing bodies of the city and county") (emphasis added). When a full-time county attorney undertakes performance of the duties of a city attorney under this statute, those duties become a part of the county attorney's "official duties" for which the county attorney receives full-time compensation.

To the extent that a full-time county attorney is doing legal work for the city, he or she is not devoting full time to the county, and it necessarily follows under Mont. Code Ann. § 7-4-2511(2) that any compensation paid for his or her work for the city should be paid over to the county general fund. In my opinion, any attorney fees paid by the Puget Sound Company should be paid to the county general fund.

THEREFORE, IT IS MY OPINION:

A full-time county attorney serving as city attorney pursuant to an interlocal agreement may not personally receive a fee from a private company for work performed on a city/county bond issue.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/kcs/brf