

November 25, 2002

Ms. Christine A. Cooke
P.O. Box 908
121 West Third Street
Hardin, MT 59034-0908

Dear Ms. Cooke:

You have requested an opinion on the following questions:

1. If there is only one fully licensed mortuary in a county, but there is a competing branch funeral chapel, is it a conflict of interest for the mortician of the fully licensed mortuary to serve as county coroner?
2. If a conflict exists, can the conflict be obviated in any manner and, if so, how?

Because a response to your questions requires specific consideration of the circumstances of Big Horn County, which appear to have been addressed by a prior formal opinion, a letter of advice, rather than a formal Attorney General's Opinion, provides the appropriate response to your request.

As you noted in your request for an Opinion, two prior Attorney General's Opinions addressed questions regarding conflicts of interest for a county coroner who is also an active mortician. In response to a similar question to the one you pose, then-Attorney General Greely held:

A county coroner who is also a mortician violates the provisions of section 59-1707(2)(b), R.C.M. 1947, if he directs that a body be taken to a funeral parlor in which he has a substantial financial interest, unless he has no discretion to select the funeral parlor.

37 Op. Att'y Gen. No. 104 at 431 (1978).

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Revised Codes of Montana § 59-1707(2)(b) is now codified at Mont. Code Ann. § 2-2-105(5). It provides:

A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.

As you noted, the current version of the law is written in terms of economic detriment to a competitor, while the version in effect at the time of Greely's 1978 Opinion was written in terms of economic benefit to the public official. However, I think the analysis remains the same and the general rule set forth in 37 Op. Att'y Gen. No. 104 at 431 (1978) still applies.

As then-Attorney General Greely noted, the key inquiry is whether the coroner has discretion regarding where a body be taken. If the coroner has the ability to exercise discretion when overseeing the placement of a body, then a conflict of interest arises.

Your letter assumes the following facts. Terry Bullis is the elected coroner for Big Horn County. Mr. Bullis also has a financial interest in, and operates Bullis Mortuary. Until recently, Bullis Mortuary was the only mortuary providing service to Big Horn County. However, Dahl Funeral Chapel has recently begun to offer services in Hardin. Although Dahl does not have facilities in Hardin in which to prepare a corpse for burial or autopsy, it does have a fully licensed mortuary in Billings where it can perform such services.

In reviewing Montana's laws governing the handling of dead bodies, the powers of county coroners and the licensing of mortuaries and morticians, there are no set timelines or procedures for the preservation of a body. A county coroner has the following responsibilities: to notify the next of kin of the deceased as soon as practicable; hold the body until the cause of death is determined or until the body is no longer needed to assist local investigations; release the body to a funeral home designated by the deceased or next of kin, or where there is not a designated funeral home, to a funeral home willing to take financial responsibility (based upon a fair and equitable rotation schedule); or, in the event the body goes unclaimed, the coroner must ensure the deceased receives a proper burial. See Mont. Code Ann. § 7-4-2911 and -2915.

You conclude that because Dahl Funeral Chapel does not operate a fully-licensed mortuary in Big Horn County, no conflict of interest exists. However, it is my opinion

that the fact a body must be transported to Billings for preparation for funeral services in Hardin does not preclude a finding of conflict of interest. No statute requires the coroner to release a body only to a mortuary located in the county. The logistics associated with the selection of Dahl Funeral Chapel is a consideration that must be left to the next of kin of the deceased, not to the discretion of the county coroner.

Thus, based upon the circumstances described and given that the Big Horn County Coroner *does in fact* exercise discretion in deciding whether to hold a body at Bullis Mortuary or to direct it to Dahl Funeral Chapel, in my opinion a conflict of interest exists.

Your second question asks if a conflict of interest exists, how can it be obviated. You conclude the only manner such a conflict could be resolved would be for Big Horn County to have its own facility to house the coroner's office. In my opinion this would not change the legal analysis. Mr. Bullis would still be in the position of releasing the body to Bullis Mortuary or to a competing funeral home after he had satisfied his responsibilities as coroner. The issue arises after Mr. Bullis has completed his official duties as coroner and has to determine proper release of the body.

As county coroner, Mr. Bullis clearly has the initial authority to take custody of a body under the circumstances set forth in Mont. Code Ann. § 46-4-122 to determine the cause of death and the identity of the deceased. I would, however, note, that costs for services provided in his official capacity as coroner may not be passed on to the family. Thus, if Mr. Bullis decides in his capacity as coroner that a body must be embalmed to preserve it for further investigation these costs must be absorbed by the county coroner budget and not be passed on to the family of the deceased.

Ultimately, how to address the conflict of interest is a matter that must be resolved by local government. You note that at the direction of the county commissioners, the Big Horn County Sheriff instituted a rotation policy between the two mortuaries on calls where the next of kin had no preference where the body was to be taken. Strict adherence to such a rotation system would appear to eliminate the coroner's discretion as to the ultimate disposition of the body. Under Attorney General Greely's analysis, this would in most cases obviate the conflict.

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This letter should not be construed as a formal Opinion of the Attorney General.

Sincerely,

CIVIL SERVICES BUREAU

ALI N. BOVINGDON
Assistant Attorney General

anb/jym