

**OPINION
79-241**

June 26, 1979 (OPINION)

Mr. Joseph A. Vogel, Jr.
Morton County State's Attorney
Box 190
Mandan, North Dakota 58554

Dear Mr. Vogel:

This is in response to your letter of June 22, 1979, in which you ask:

1. Can assistants employed by a full time State's Attorneys office using county facilities and services associated with said office, receiving county salaries and benefits, maintain a private law practice the same as assistants in a part-time State's Attorneys office?
2. Can assistants employed by a full time State's Attorneys Office using county facilities and services associated with said office, receive a regular county salary and benefits, maintain a private law practice at another location?
3. May assistants who maintain a private law practice separated from the State's Attorneys office be employed upon a contractual basis to represent the county in civil or criminal matters assigned to them?

The provisions of the Century Code which must be considered in resolving your questions follow:

11-16-05. RESTRICTIONS ON POWERS OF STATE'S ATTORNEY - PENALTY FOR BREACH OF DUTY. - The state's attorney shall not:

1. Present a claim, account, or other demand for allowance against the county, except for his own services, nor in any way advocate the relief asked for by the claim or demand of another.
2. Be eligible to or hold any judicial office except that of United States Commissioner.
3. Receive a fee or reward from or on behalf of a prosecutor or other individual for services in any prosecution or business to which it is his official duty to attend.
4. Be concerned as attorney or counsel for any party, other than the state or county, in any civil action depending upon, or arising out of, a state of facts upon which a pending and undetermined criminal prosecution depends.
5. Be concerned as attorney or counsel for any party, other than the state or county, in any action or proceeding

whatsoever when employed by a county having a population exceeding thirty-five thousand or by any other county whose board of commissioners has, by resolution, determined that the state's attorney shall be restricted in this manner. A board of county commissioners may adopt or rescind this resolution in any year. However, in the general election year in which the state's attorney is to be elected, such action must be taken prior to June first. Such adoption or rescission shall not be effective during the state's attorneys current term of office unless agreed upon between the board and the state's attorney.

A violation of any provision of this section shall constitute an infraction, and the offender may be removed from office.

11-16-02. ASSISTANT - APPOINTMENT - DUTIES. - The state's attorney may appoint an assistant state's attorney within his county, who, when he has qualified by filing his oath of office, shall have the same powers as, and shall perform any and all duties required of, the state's attorney. The state's attorney shall be responsible, under his official bond, for any and all acts of such assistant.

11-16-08. COUNTY COMMISSIONERS MAY EMPLOY SPECIAL COUNSEL FOR THE COUNTY. - The board of county commissioners, in cases of public importance and with the advice and consent of the state's attorney, may employ additional counsel to assist the state's attorney. Such counsel shall receive such compensation as may be agreed upon between the parties.

11-10-11. APPOINTMENT AND SALARY OF DEPUTIES AND CLERKS. - The number and salaries of deputies, clerks, and assistants for the county auditor, county treasurer, sheriff, register of deeds, county judge, and clerk of the district court shall be fixed by a resolution of the board of county commissioners. None of the officers mentioned in this section shall appoint as his deputy any other officer mentioned in this section nor the deputy of any such officer. The board of county commissioners upon written recommendation and approval of the state's attorney may appoint one or more assistant state's attorneys or clerks and fix their compensation in the same manner as in the case of deputies and clerks in other county offices. The work of such assistant state's attorneys shall be assigned by the state's attorney.

With regard to your first question, state law does not subject assistant state's attorneys in counties where there is a full-time state's attorney to any different restrictions than those to which assistant state's attorneys in counties where the state's attorney is part-time must conform. Action is necessary on the part of both the state's attorney and the county commissioners to appoint and compensate assistant state's attorneys. The state's attorney and the commissioners must reach some type of understanding as to the duties of the assistant state's attorneys and the compensation due for the performance of those duties. We are of the opinion that the state's attorney and commissioners have wide latitude in these matters. They may determine whether the assistant state's attorney should be

restricted from acting as counsel for any party other than the state or county and whether the assistant state's attorney should be allowed to conduct a private law practice out of the state's attorney's office in the county courthouse as part of his or her compensation. In making the latter determination, Section 185 of the North Dakota Constitution must be considered. That section reads as follows:

Section 185. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

It follows, then, that assistant state's attorneys may be allowed to maintain a private practice of law at a location other than the office provided by the county for the state's attorney. It is also clear that attorneys who maintain a private practice of law may be employed upon a contractual basis to represent the county in civil or criminal matters assigned to them.

We recognize that assistant state's attorneys who also engage in the private practice of law are faced with many potential questions of professional ethics. We do not, however, believe it is our function to enter the field of professional ethics, because those matters fall within the province of the State Bar Association.

Sincerely,

ALLEN I. OLSON

Attorney General