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March 12, 2024

Tracy L. Kelley
Custer County State's Attorney
420 Mt. Rushmore Rd.
Custer, SD 57730

OFFICIAL OPINION No. 24-01

Re: Official Opinion Concerning the Ability of Full-Time State's Attorneys to Engage in the Private Practice of Law

Dear State's Attorney Kelley,

In your capacity as the State's Attorney for Custer County you have requested an official opinion from the Attorney General's Office on the following question:

QUESTION:

Does SDCL § 7-16-9 prohibit full-time state's attorneys from engaging in the private practice of law, outside of their state's attorney's position, whether done with or without compensation?

ANSWER:

No. SDCL § 7-16-19 only prohibits a full-time state's attorney from representing a private party in a civil or criminal proceeding pending in the courts of the State. SDCL § 7-16-9 does not prohibit a full-time state's attorney from otherwise engaging in the private practice of law.

FACTS:

State's attorneys are elected or appointed officials that prosecute and defend, on behalf of the State or county, all civil or criminal actions or proceedings where the state or county is an interested party. State's attorneys also provide legal opinions and advice to their county commission and other county offices.

Historically, the Custer County state's attorney has been a part-time position, but was changed to a full-time position prior to the last election. The question has arisen concerning your ability to perform work outside of your duties as a full-time state's attorney.

IN RE QUESTION:

You have requested an interpretation of the following statutory language:

In any county of over fifty thousand population and any other county where the board of county commissioners so designates, the state's attorney shall be a full-time position and the state's attorney may not be counsel or attorney in any action, civil or criminal, in the courts of this state except when acting on behalf of the county or the State of South Dakota.

SDCL § 7-16-19.

When interpreting a statute to determine its meaning, “the language expressed in the statute is the paramount consideration.” *Olson v. Butte County Comm’n*, 2019 S.D. 13, ¶ 5, 925 N.W.2d 463, 464 (quoting *Goetz v. State*, 2001 S.D. 138, ¶ 5, 636 N.W.2d 675, 68). “When the language in a statute is clear, certain and unambiguous, there is no reason for construction.” *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12, 907 N.W.2d 785, 789 (internal citation omitted). When the intent of the statutory language is unclear, “the intent of the legislature is derived from plain, ordinary and popular meaning of the statutory language.” *Id.*

The plain language of SDCL § 7-16-19 prohibits full-time state's attorneys from representing anyone, except their county or the State, in a civil or criminal action in the courts of this State. Considering this, it is my opinion that the statute only restricts a full-time state's attorney from representing private clients in those civil or criminal proceedings that are pending before courts in South Dakota. I find no prohibition in the language of the statute prohibiting a full-time state's attorney from conducting other private legal work outside the courtroom. Similarly, the language of the statute also does not prohibit a full-time state's attorney from engaging in civil or criminal practice in federal court.

If the Legislature intended to limit a full-time state's attorney's ability to engage in the private practice of law, it could have included that limitation in the statute. For comparison consider the statutory language limiting the Attorney General's ability to conduct private legal work. "The attorney general shall serve on a full-time basis and may not actively engage in the private practice of law." SDCL § 1-11-1.1. The Legislature prohibited the Attorney General from engaging in any private legal practice. In contrast, the Legislature has only prohibited full-time state's attorneys from representing private legal clients in proceedings before the civil and criminal courts of the State.

I must "assume that statutes mean what they say and that legislators have said what they meant." *Reck v. S.D. Bd. of Pardons & Paroles*, 2019 S.D. 42, ¶ 14, 932 N.W.2d 135, 140 (cleaned up). The language of SDCL § 7-16-19 does not prohibit a full-time state's attorney from providing legal counsel to private clients in matters that are not before the various courts of the State.

CONCLUSION:

I conclude that SDCL § 7-16-19 prohibits a full-time state's attorney from representing a private party in a civil or criminal matter in the courts of the State. The statute does not prohibit a full-time state's attorney from otherwise engaging in the private practice of law.

Sincerely,



Marty A. Jackley
ATTORNEY GENERAL

MJJ/EEH/SRB/dd