

**VOLUME NO. 34**

**Opinion No. 25**

**OFFICES AND OFFICERS - State representative; serving as legal counsel to state board. Article V, section 7, Montana Constitution.**

**HELD: A state representative may serve as legal counsel to a state agency during his term as representative without violating Article V, section 7 of the Montana Constitution.**

November 16, 1971

Mr. Morris L. Brusett  
Legislative Auditor  
State Capitol  
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion as to whether an individual may concurrently hold positions as a state representative and as retained counsel for a state agency without violating Article V, section 7 of the Montana Constitution.

Article V, section 7 of the Montana Constitution provides:

“No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state; and no member of congress, or other person holding an office (except notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office.”

This constitutional provision has been the subject of litigation, and has been interpreted by the Montana Supreme Court. In **State ex rel. Barney v. Hawkins**, 79 Mont. 506, 257 P. 411 (1927), the Montana Supreme Court stated that the reference to “civil office” in Article V, section 7, Montana Constitution, means any public office not of a military character. In determining what constituted a public office, the court stated at page 528:

“After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity and not be only temporary or occasional . . .”

The question involved in the **Barney** case was whether the appointment of an individual to the position of auditor for the board of railroad commissioners of Montana at the time he was also a representative in the Montana legislature, violated Article V, section 7 of the Montana Constitution. After an exhaustive discussion of the subject, the Montana Supreme Court held that the position of auditor

was not a civil office under the state and, therefore, the individual in question was only an employee, and that there was no violation of Article V, section 7 of the Montana Constitution.

The Montana Supreme Court again considered this matter in **State ex rel. Nagle v. Page**, 98 Mont. 14, 37 P.2d 575 (1934), where the question was whether an individual could serve as state boiler inspector while also serving as a state senator. The Montana Supreme Court, referring to the guidelines set down in the **Barney** case, held that a state boiler inspector was an **employee** rather than an officer of the state of Montana and, therefore, his employment as boiler inspector and concurrent service as state senator did not violate Article V, section 7 of the Montana Constitution.

In **State Tax Commission v. Harrington**, 94 Atl. 537 (1915), the Court of Appeals of Maryland determined, under a constitutional provision similar to Article V, section 7 of the Montana Constitution, that a state senator could serve as general counsel to the State Tax Commission without violating the constitutional provision prohibiting a state senator from holding any other public office during his term. The court stated at page 539:

“In view of said cases and authorities stating what is and what is not an office, the position of general counsel to the State Tax Commission is not, in our opinion, an office, within the meaning of the constitutional provision here involved.

\* \* \*

“In the case before us the Commission may, under the provisions of the statute, appoint general counsel, but it is not required to do so. The salary and tenure of the employment are not fixed, no oath of office is required, no official bond is given, no commission issued, and the incumbent exercises no sovereign power, but only such power as is derived from and through the State Tax Commission, and is simply an employee or agent of the Commission.”

Applying the five prerequisites to a position being considered a public office, as set forth in the **Barney** case, it would appear that the position of legal counsel would not be considered a public office of civil nature as defined by the Montana Supreme Court, as the position of legal counsel is not created by the legislature, he does not exercise a portion of the sovereign power of government, and his duties are not performed independently and without control of a superior power.

**THEREFORE, IT IS MY OPINION** that the position of legal counsel for a state agency is not a public office, and concurrent service

as a state representative and as legal counsel for a state agency is not in violation of Article V, section 7 of the Montana Constitution.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General