

DE 88-21 - July 14, 1988

Resign-to-Run Law
Section 99.012(2), (7), F.S.

To: Mr. Frank Schaub, State Attorney, Twelfth Judicial Circuit, Suite 438, 1401 Manatee Avenue West, Post Office Box 1000, Bradenton, Florida 34205

Prepared by: Division of Elections

This is in reference to your request for an advisory opinion regarding the Resign-to-Run Law. You are State Attorney for the Twelfth Judicial Circuit and are considering not seeking reelection as state attorney. You are requesting this opinion on behalf of several assistant state attorneys in your office who are considering running for state attorney. We have authority under Section 106.23(2), Florida Statutes, to issue this opinion to you. Your specific questions are as follows:

1. Whether the Resign-To-Run Law applies to an assistant state attorney?
2. Whether the term of office or any part thereof of a state attorney and an assistant state attorney are concurrent since an assistant state attorney serves "during the pleasure of the state attorney appointing him." Section 27.181(2), Fla. Stat.
3. If an assistant state attorney must resign or take a leave of absence, when should such resignation or leave be effective?

In reference to your first question, whether the Resign-to-Run Law applies to an assistant state attorney, we have previously determined that an assistant state attorney is an officer under the Resign-to-Run Law and, therefore, the Resign-to-Run Law applies. Op. Div. Elect. Fla. 80-37

In reference to your second question, whether the term of office or any part thereof of a state attorney and an assistant state attorney are concurrent since an assistant state attorney serves during the pleasure of the state attorney appointing him, the Florida Supreme Court has determined that officers who serve at the pleasure of another creates "continuing offices without defining or fixing the terms of the officers who are to discharge the duties of the offices created." State v. Botts, 134 So. 219, 221 (1931). (Emphasis added.)

In the State v. Botts case, a statute which provided that the governor "shall appoint four duly qualified citizens of this state to serve as assistant county solicitors, who shall hold during the pleasure of the governor" was found unconstitutional because the Florida Constitution at that time provided that "the legislature shall not create any office, the term of which shall be longer than four years." Art. XVI, S. 7, Fla. Const. (1885). Florida's present Constitution prohibits any office exceeding four years, except as provided in the constitution. Art. III, S. 13, Fla. Const. (1968). However, Article V, which deals with the judiciary including state attorneys, provides that "state attorneys shall appoint such assistant

state attorneys as may be authorized by law." Therefore, the Constitution permits the Legislature to authorize assistant state attorneys including their terms of office.

In view of State v. Botts, an assistant state attorney's office is a continuing office and his term of office is, therefore, not concurrent with the four-year term of state attorney.

In reference to your third question, if an assistant state attorney must resign or take a leave of absence, when must such resignation or leave of absence be effective, Section 99.012(7), Florida Statutes, provides an exception from the Resign-to-Run Law. The exception applies to an officer who is a subordinate personnel, a deputy sheriff or police officer who not seeking to qualify for a public office which is currently held by an individual who has the authority to appoint, employ, promote or otherwise supervise that person.

Therefore, whether an assistant state attorney must resign or take a leave of absence depends upon whether you qualify for reelection as state attorney. If you do, any assistant state attorney in your judicial circuit running against you must resign at the time you qualify for reelection. If you do not seek reelection, an assistant state attorney would need to take a leave of absence during the period in which he is seeking election to public office.

We refer you to several opinions issued by the division this year that discuss "seeking election." We have previously opined that simply announcing your candidacy or designating a campaign treasurer and a campaign account will not trigger the leave of absence provision of Section 99.012(7), Florida Statutes. Op. Div. Elect. Fla. 88-04, 88-03. In addition, the acceptance of contributions and expenditures of funds is permissible as long as the individual is preparing to seek election and is not actively seeking election. Op. Div. Elect. Fla. 88-18. However, when a person's activities signaled to the general public that that person is a candidate and is actively seeking election to a particular office, the leave of absence provisions are triggered. Op. Div. Elect. Fla. 88-20.

SUMMARY

An assistant state attorney who is appointed by the state attorney is an officer. When an officer serves at the pleasure of the another officer, his office is a continuing office and the provisions of the Resign-to-Run Law apply. If an assistant state attorney runs against the state attorney who appointed him he must resign at the time the state attorney qualifies for reelection. If, however, the state attorney who appointed him is not running for reelection, the assistant state attorney must take a leave of absence when seeking election as state attorney.