

DE 90-36 - August 7, 1990

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

To: Mr. David M. Owen, Assistant County Attorney, Lee County, Post Office Box 398, Ft. Myers, Florida 33902-0398

Prepared by: Division of Elections

This is in reference to your July 13, 1990 letter to the Division of Elections requesting an opinion on the Resign-to-Run Law. You are an Assistant County Attorney for the Lee County Board of County Commissioners and plan to run for county court judge. The Division of Elections has authority under Section 106.23(2), Florida Statutes, to issue this opinion to you.

Your question is:

Whether an assistant county attorney employed by the Lee County Board of County Commissioners is an "officer" or "subordinate" per the provisions of Section 99.012, Florida Statutes, and as such is required to either resign or take leave of absence from that position in order to campaign as a candidate for elective public office (i.e., County Court Judge)?

The Resign-to-Run Law requires an elected or appointed officer to irrevocably resign when seeking an elected office which runs concurrently, or any part runs concurrently, with the term of office he presently holds. Section 99.012(2), Fla. Stat.

Section 99.012(7), Florida Statutes, provides an exemption from the Resign-to-Run Law for three categories of persons: an officer who is a subordinate personnel, a deputy sheriff or police officer. Each of these three need not resign unless 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 and has qualified for re-election to that office.

The primary question, therefore, is whether a county attorney is an officer pursuant to the Resign-to-Run Law. An officer is defined as one who exercises some portion of the sovereign power either in making, executing or administering the law. State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721 (1887). See also State ex rel. Holloway v. Sheats, 83 So. 508 (Fla. 1919).

The Florida Constitution provides that the governing body of each county is a board of county commissioners and that counties which are not operating under a charter form of government will have such power of self-government as is provided by general or special law. Art. VIII, Section 1(e), Fla. Const. Lee County is not a charter county.

Section 125.01(1)(b), Florida Statutes, provides that the county commissioners have the power to

provide for the prosecution and defense of legal causes in behalf of the county or state and retain counsel and set their compensation. In AGO 71-347, the Attorney General noted that the attorney retained by the county commissioners under the authority of Section 125.01(1)(b), Florida Statutes, has no statutory tenure or duties, and opined that a county attorney would not be deemed to be a county "officer."

It seems clear from Section 125.01(1)(b), Florida Statutes, and the Attorney General's Opinion that a county attorney functioning under this statute is an attorney who works solely at the direction and for the Board of County Commissioners and that the attorney exercises no sovereign powers in his own right.

Therefore, it is our opinion that the Assistant County Attorney for Lee County is not an officer for the purposes of the Resign-to-Run Law. Therefore, under the Resign-to-Run Law, an assistant county attorney is not required to either resign or take a leave of absence to run for public office.

SUMMARY

The County Attorney and the Assistant County Attorney for Lee County are not officers for the purposes of the Resign-to-Run Law. Therefore, under the Resign-to-Run Law, the county attorney and the assistant county attorney are not required to either resign or take a leave of absence to run for public office.