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ATTORNEY GENERAL OPINION NO. 87-3

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Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Is the office of the county sheriff primarily responsible for attending district and magistrate courts?

2. In addition to the sheriff, are other court attendants authorized by statute?

3. Does a district court have the inherent authority to appoint non-sheriff court attendants when the sheriff is able and willing to so function?

4. Can the sheriff be held civilly liable for the wrongful acts of court-appointed attendants?

CONCLUSIONS:

1. It is the duty of the county sheriff to attend all courts located within his county.

2. There is no statutory authority by which the court may appoint a bailiff, marshal, constable, special constable or other staff member to perform the duties of a regular court attendant.

3. A district court has the inherent authority under Idaho case law to appoint court attendants when the sheriff fails to fulfill that statutory obligation or when exigent circumstances so require.

4. A sheriff is potentially liable for the wrongful conduct of court attendants appointed by a court when he fails to fulfill his statutory obligation to provide court attendants or negligently supervises such attendants.

ANALYSIS:

Question 1:

In answering the question of whose duty it is to attend the district and magistrate's court, it is first necessary to define the duties of court attendants. Four general categories of duties are customarily provided by court attendants and are reasonably necessary for proper court functioning. First, the attendant has the traditional duty of "court crier." This includes announcing the opening and adjournment of court, maintaining order and decorum, directing jurors to their places during voir dire, taking charge of the jury during deliberations, handing exhibits to witnesses, and other miscellaneous tasks for the smooth running of the courtroom. Second, the attendant provides safety and security to those in the courtroom. Third, the attendant keeps custody of prisoners while in the courtroom and while escorting or transporting them to and from the jail. Finally, the attendant may be called on to serve arrest warrants and other process issued from the bench, particularly in cases where a defendant, witness or juror has failed to appear. See generally, Idaho Code § 31-2215, Merrill v. Phelps, 52 Ariz. 526, 84 P.2d 74 (1938). The four categories described above are not exhaustive; in practice, the scope of a court attendant's duties varies, depending upon local custom.

Under the common law it was the sheriff or his deputy who was required to attend all sessions of court held in his county, as well as obey the lawful orders and directions of a court and execute its process and summons. 80 C.J.S. Sheriffs and Constables § 35, p.204. In the case of State ex rel. Hillis v. Sullivan, 48 Mont. 320, 137 P. 392 (1913), the Montana Supreme Court discussed this common law requirement:

> In general, the common law relations of the courts to the sheriff have been preserved in the United States. In the absence of a statute to the contrary, the office of sheriff imports, and has always imported, that it is the sheriff that is the executive arm of the district court, that it is both his duty and privilege to attend upon its sessions, either in person or by deputy, to act as the crier of the court, [and] to execute the lawful orders of the court.

137 P. at 394 (emphasis added).

The common law duty of a sheriff to attend the courts within his county was codified in virtually every jurisdiction in the country. The Idaho legislature required under Idaho Code § 31-2202 that the sheriff:

> (4) Attend all courts except justices' and probate courts, at their respective terms held within his county, and obey their lawful orders and directions.

Probate courts, justice of the peace courts, and police courts were legislatively abolished, effective January, 1971. The jurisdiction of these courts was transferred to the district courts and the magistrate's division thereof. Idaho Code § 1-103. 1969 Sess. Laws, ch. 100, p.344. Idaho Code § 31-2202 was then amended to provide that, effective January, 1971, the sheriff must:

> (4) Attend all courts, including the magistrate's division of the district court when ordered by a district judge, at their respective terms held within his county, and obey the lawful orders and directions of the courts.

1970 Sess. Laws, ch. 120, p.288.

In our opinion, this amendment reflects the legislature's intention that the primary duty of attending "all courts" is that of the county sheriff. The fact that a sheriff attends the courts of the magistrate's division when ordered to do so by a

district judge does not, in our opinion, support an inference that some other person has the duty or authority to attend those courts. Where a statute is clear and unambiguous, the express intent of the legislature must be given effect. Intermountain Health Care v. Board of County Commissioners of Madison County, 109 Idaho 685, 710 P.2d 595 (1985).

When one considers the range of activities that must be engaged in by a court attendant in order to allow a court to function properly, it becomes even more apparent that the legislature intended the sheriff to serve in that capacity. This is because many of those activities can only be performed by a "peace officer." For example, a court may issue an arrest warrant from the bench, and it must be served. Arrest warrants must be directed to and executed by a peace officer. Idaho Code §§ 19-509, 19-603. A private person cannot serve an arrest warrant and may arrest without a warrant only in limited circumstances. Idaho Code § 19-604. In addition, court security requirements may call for a court attendant to wear a concealed weapon. No person other than a county, state or federal official or a peace officer may carry a concealed weapon unless the sheriff so authorizes. Idaho Code § 18-3302. Furthermore, someone must have custody of the prisoner in court and during transportation to and from the jail. It is the sheriff who has the exclusive duty to maintain the county jail and keep custody of pretrial detainees and prisoners sentenced to the county jail. Idaho Code §§ 20-601, 31-2202. It is obvious that these functions all properly belong to a peace officer.

Peace officers are defined in two places in the Idaho Code. Enacted in 1864, Idaho Code § 19-510 defines a peace officer as a "sheriff of a county or a constable, marshal or policeman of a city or town." In the context of chapter 5 of Title 19 of the Idaho Code, this definition relates narrowly to service and execution of criminal complaints and arrest warrants. Enacted over 100 years later in 1981, Idaho Code § 19-5101 defines a peace officer as follows:

> (d) "Peace officer" means any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivision thereof and whose duties include and primarily consist of the prevention and

> detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision. (Emphasis added.)

Chapter 51 of Title 19 of the Idaho Code relates to the Peace Officers Standards and Training Council. It contains a comprehensive expression of legislative intent that peace officers, as defined therein, be professionally certified after meeting certain competency requirements of statewide application. (See, Attorney General Opinion 87-1.)

A sheriff and his deputies are by definition peace officers under both Idaho Code §§ 19-510 and 19-5101. They are enumerated under the former statute and they are also employees of a law enforcement agency whose duties primarily consist of prevention and detection of crime. They would, therefore, be able to perform all functions of court attendants described above.

Conversely, non-sheriff personnel who are appointed by courts to serve as attendants under the designation of "court marshal" or "bailiff" are not peace officers under either statutory definition. Their duties do not, as required by Idaho Code § 19-5101(d), "primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision."

Reliance upon Idaho Code § 19-510 as conferring peace officer status upon a "court marshal" is unwarranted. The statute makes no reference to court marshals. Moreover, "marshal" has historically been defined as a police officer of a municipality. 55 C.J.S. Marshal, p.954. A plain, unambiguous reading of the statute leads to the conclusion that the legislature intended to refer to a marshal of a city or town in the narrow context of execution of complaints and arrest warrants.

Conclusion:

There are several broad categories of duties that a court attendant performs in order to allow a court to function properly. Historically, the sheriff has performed these duties as the executive arm of the court. The sheriff's duty to attend the courts is also clearly mandated by statute in Idaho. The

existence of "peace officer" related duties of court attendants also leads to the conclusion that the sheriff has the primary responsibility to act in that capacity.

Question 2:

In answering the question whether a court has the statutory authority to appoint court attendants other than county sheriffs, we note that several methods for the appointment and designation of court attendants have developed in courts around the state, depending upon local custom, unique needs and legal interpretation. According to an informal survey of district court administrators, court attendants have been independently hired with and without sheriff deputization. These court attendants are designated as "bailiffs," "court marshals" and "special constables." In answering this question, we address only the court's authority to appoint court attendants without sheriff deputization, and in the absence of exigent circumstances. We expressly caution that we have not determined how the various methods of designating and appointing non-sheriff court attendants arose throughout the state. Thus, we do not attempt to pass judgment on the validity of these arrangements. Our discussion of a court's authority to appoint court attendants under exigent circumstances is reserved for Question 3 below. Finally, while our response addresses the various designations of court attendants that have developed around the state, we emphasize that a court attendant receives authority to act not from the particular title bestowed upon him by the court, but only from the statutory or inherent authority to appoint such attendants in the first place.

A. The appointment of a "bailiff" as court attendant.

There is no statute authorizing the appointment or election of "bailiffs" in Idaho. At common law, a bailiff was not the holder of an independent office. Indeed, the term "bailiff" was used to "denote a deputy sheriff in charge of a jury." 8 C.J.S. Bailiff, p.308. Thus, there is no statutory authority for court appointment of bailiffs as court attendants. This fact is recognized by those courts around the state that are attended by bailiffs who have been deputized by the sheriff pursuant to Idaho Code § 31-2003.

B. The appointment of a "marshal" as court attendant.

There is no statute specifically authorizing the appointment of a "marshal" to act as a court attendant in Idaho. Nevertheless, references to marshals and their law enforcement related functions are found in several places in the Idaho Code. Therefore, we address the question of whether there is implied statutory authority to appoint marshals to serve as court attendants.

At common law, the term "marshal" was defined as an officer of a municipality occupying the same relation to the governmental affairs of the municipality as the sheriff to his county or the constable to his town. 55 C.J.S. Marshal, p. 954. In Idaho, the position of marshal was expressly recognized in 1941 when the portion of the municipal laws describing the powers of policemen was amended and recodified to include marshals:

> 49-331. Powers of Policemen. The policemen or marshals of the city or incorporated village shall have power to arrest all offenders against the law of the State, or of the city, or such village, by day or by night, in the same manner as the sheriff or constable, and keep them in the city prison or other place to prevent their escape until trial can be had before the proper officer.

1941 Sess. Laws, ch. 68, p.132. This section has been recodified in Idaho Code § 50-209. Marshals are no longer mentioned therein.

The traditional city marshal was considered a peace officer, Idaho Code § 19-510, and as such could make arrests, Idaho Code §§ 19-509, 19-603, and execute search warrants, Idaho Code § 19-4407. It appears, therefore, that at one time in Idaho's history, the powers of city marshals were similar to those of city policemen. From this proposition, one might argue that city marshals also had implied statutory authority to attend police courts. These courts existed before the Court Reform Act and had jurisdiction over matters under city ordinances as well as misdemeanor violations of state law that took place within city limits. The police court judge had the

authority to issue warrants, hold hearings, summon witnesses, render judgment, and assess punishment for offenses over which he had jurisdiction. See, former Idaho Code §§ 50-122 and 50-334. The police court judge may then impliedly have had the statutory authority to appoint attendants from the ranks of policemen and/or marshals to attend the court and assist in carrying out its duties.

Whatever implied statutory authority city marshals may have had to attend city police courts disappeared in 1971 with the Court Reform Act, which abolished probate courts, justice of the peace courts, and police courts, and transferred their jurisdiction to district court and the magistrate's division thereof. Idaho Code § 1-103; 1969 Sess. Laws, ch. 100, p.344. Later, under a corresponding amendment to Idaho Code § 31-2202, the sheriff was given the responsibility of attending all courts, including the magistrate's division when ordered by a district judge. 1970 Sess. Laws, ch. 120, p.288.

This analysis is bolstered by the fact that in 1967 there had been a complete recodification of the municipal codes. The distinctions between villages and cities of the first or second class were eliminated. Pursuant to these changes, the police court judge could direct service of warrants to "...the chief of police or other police officer of the city, the sheriff, constable of the county, or some person specially appointed in writing, ..." 1967 Sess. Laws, ch. 429, § 455, p.1411. City marshals were deleted from the list.

We conclude from this historical survey that the court cannot simply appoint someone and call him a "marshal," thereby conferring upon him peace officer status and enabling him to carry a concealed weapon, serve arrest warrants, take custody of prisoners and secure courtrooms. However, if the sheriff cooperates with the court, a "marshal" could be authorized to perform all the sheriff's court attendance duties, after being deputized by the sheriff. Idaho Const. art. 18, § 6; Idaho Code § 31-2003.

C. The appointment of a "constable" as court attendant.

At common law "constable" was traditionally defined as an officer of a municipal corporation, usually elected, whose duties were similar to those of the sheriff. While the constable's powers were typically less than those of the

sheriff, his traditional duties were to preserve the peace, execute process of magistrate's courts and of some other tribunals, serve writs, attend sessions of the criminal courts, and have custody of juries. 80 C.J.S. Sheriffs and Constables § 3, p.154.

In 1887, the Idaho legislature established the office of constable, relying upon the authority of art. 18, § 6, of the Idaho Constitution, which allows the establishment of "such ... precinct ... officers as public convenience may require." Pursuant to this constitutional authority, the legislature made justices of the peace and constables precinct officers and delegated to the board of county commissioners the power to fix precincts for justices of the peace and constables.

The statutory function, responsibilities, and authority of the constable's office, first codified in 1887, existed in every codification of Idaho law without change until court reform. E.g., compare, 1887 R.S. § 2090 with Idaho Code § 31-3002 prior to the 1969 amendments. The duties relevant to this discussion were set out in previous I.C.A. § 30-2502:

> Duties of Constables.-- Constables must attend the courts of justices of the peace within their precincts whenever so required, and within their counties execute, serve and return all process and notices directed or delivered to them by a justice of the peace of such county, or by any competent authority.

Pursuant to the Court Reform Act, constables' duties were changed. With the elimination of justice of the peace courts, constables were required to attend the new magistrate's courts. Idaho Code § 31-3002; 1969 Sess. Laws, ch. 119, p.378. Constables were not required or empowered to attend district courts.

A year later in 1970 (and before the January, 1971, effective date of the Court Reform Act), the Idaho legislature continued its comprehensive reform of the Idaho governmental process by enacting election reform. The Election Reform Act specifically listed the qualifications for every elected state and county official and, in so doing, deleted all references to constables. It also deleted all reference to "precinct officers," eliminated precinct elections, and amended Idaho Code § 31-2002 to make constables

"county officers." 1970 Sess. Laws, ch. 120, § 4, p.286. However, while former Idaho Code § 33-207 had provided for the election of precinct constables, the legislature did not provide an election or appointment mechanism for the new county office of constable. As a result, the present statutes pertaining to constables set forth their duties but are silent as to how a constable comes into being. Idaho Code §§ 31-3002, et seq. Without a statutory mechanism for the election or appointment of constables, they no longer legally exist in Idaho.

Our research has revealed no specific expression of what the legislature intended with respect to the continued existence of constables. A plausible analysis is that the legislature intended to phase out the office of constable and its duties. The legislature may have intended that constables still in office at the time of election reform were to attend to the magistrate's courts until the end of their terms. At that time, the office would become forever vacant and the sheriff would thereafter assume the primary responsibility for attending the magistrate's courts if needed. Idaho Code § 31-2202. On the other hand, the legislature may simply have overlooked the need to establish a mechanism for the election of county constables. Regardless of what the legislature intended in 1970, there appear to be no remaining constables to attend to the courts. And, as noted above, the sheriff is statutorily authorized to act in that capacity.

Under another analysis, the office of constable was rendered constitutionally illegal upon the enactment of 1970 Sess. Laws 1970, ch. 120, § 4, amending Idaho Code § 31-2002. That statute formerly dealt with precinct officers. As was noted above, in 1970, "precinct officers" were eliminated and constables were redesignated as "other county officers." However, art. 18, § 6 of the Idaho Constitution expressly prohibits the establishment of county offices other than those specifically enumerated therein. Constables are not enumerated as a county office in the constitution. Therefore, the legislative designation of constable as a county officer was constitutionally void as there can be no "other county officers" besides those enumerated in art. 18, § 6.

Under either analysis, the office of constable is defunct and the duty of attending court is now statutorily assigned to the sheriff. With the sheriff charged with these duties, the courts have no implied power under Idaho Code § 31-3002 to appoint constables to attend to magistrate's courts.

D. The appointment of a "special constable" as court attendant.

Historically, a justice of the peace has statutory authority to appoint special constables for particular purposes. 80 C.J.S. Sheriffs and Constables § 29b(1), p.198. In Idaho, this statutory authority has existed since 1907. See, I.C.A., § 30-2510. Until amended in 1969, this provision appeared in Idaho statutory law without modification. However, with the Court Reform Act and the abolition of justices of the peace and the transfer of their jurisdiction to the magistrate's court, the statutory authority to appoint a special constable was given to the magistrate's court. Idaho Code §§ 31-3010, 31-3011. 1969 Sess. Laws, ch. 119, §§ 3 and 4, p.378.

Despite these variations, however, an important limitation on the appointment of special constables has remained unchanged. This appointment is available to the magistrate only when a legally qualified constable is "absent ... otherwise incapacitated, or prevented from performing the duties of his office. ..." Idaho Code § 19-3010. As we have shown above, regular constables no longer exist in Idaho. Consequently, the "special constables," cannot be called into being as their emergency substitutes.

We have also considered two recent Idaho cases mentioning the powers of "constables" and "special constables": Ketterer v. Billings, 106 Idaho 832, 863 P.2d 868 (1984), and Ziegler v. Ziegler, 107 Idaho 527, 691 P.2d 773 (Ct.App. 1985). These two cases are troubling. They seem to stand for the proposition that magistrates (and district court judges) are authorized, pursuant to Idaho Code § 19-3010, to appoint "constables" and "special constables" to carry out various court directives.

This conclusion is not warranted by a close reading of the cases, including the briefs that were before the courts on appeal. In Ketterer, the Idaho Supreme Court held only that a district court was a "competent authority" to appoint a special constable to conduct an execution sale. In Ziegler, the Court of Appeals affirmed without comment the trial court's ruling that the pro se defendant could not complain that a "constable" rather than a sheriff had served the writ of execution.

Neither case addressed the question of which officer is statutorily authorized to attend the courts. Neither case traced

the history or addressed the scope of duties that could be assigned to a "constable" or "special constable." Neither case challenged the constitutionality of transforming constables from "precinct officers" to "county officers." In sum, the cases stand only for their own holdings, namely, that the named defendants could not be heard to complain of the court orders authorizing writs of execution against them. Neither party stood in the shoes of a county sheriff and asserted a statutory right to serve as court attendant. That issue simply was not addressed.

Therefore, neither Ketterer nor Ziegler alters our conclusion that Idaho Code § 31-3010 is not valid statutory authority for the appointment of special constables to serve as court attendants. As indicated above, the duties of court attendants, formerly split between sheriffs and constables, now rest solely with sheriffs. If there are no constables, there can be no special constables to perform constable duties. In the few counties where "special constables" have been appointed to attend the court, they are acting without statutory authority, unless deputized by the sheriff or justified by exigent circumstances.

E. Other Personnel. Staff members.

The Court Reform Act makes each county responsible for providing facilities, equipment, "staff personnel," supplies and other expenses of the magistrate's division. Idaho Code § 1-2217; 1969 Sess. Laws, ch. 121, § 1, p.381. Cities were charged with the same responsibility upon a majority vote of the district judges in the judicial district. Idaho Code § 1-2218. 1969 Sess. Laws, ch. 121, § 2, p.381. Such requirements do not, in our opinion, create the authority for the appointment of court attendants. Taken in context, these two statutes list the provisions for "staff personnel" together with facilities, equipment, supplies, and other expenses, all of which would be necessary for the administration of the court system. They are intended to allocate the financial burden of providing for the magistrate's courts between the counties and cities. This conclusion is buttressed by Idaho Code § 1-2219, which requires the state to provide salaries and travel expenses for magistrates. 1969 Sess. Laws, ch. 121, § 3, p.381. In any event, the "staff personnel" provided by the county or city are not given specific statutory authorization to perform any of the functions of court attendants. Nor are "staff personnel" recognized as "peace officers." Thus, they are not competent to

perform the full range of security functions of court attendants. Idaho Code §§ 19-510, 19-5101.

Conclusion:

There is no statutory authority by which the court may appoint a bailiff, marshal, constable, special constable or other staff member to perform the duties of a regular court attendant. Bailiffs have no independent statutory existence and have traditionally held their authority as deputy sheriffs. A court marshal has neither express nor implied statutory authority to act as court attendant. While Idaho statutes make reference to marshals as peace officers, their functions have largely been eliminated. There are no constables in Idaho because there is no mechanism for their election or appointment; moreover, they are a constitutionally illegal "county office." Because there are no constables, there can be no special constables to act in their place. Finally, the appointment of other staff members to serve as court attendants is not authorized by statute.

Question 3:

A court does have the inherent authority to appoint court attendants. However, it is clear that this inherent authority has been very carefully circumscribed. In the case of State v. Leavitt, 44 Idaho 739, 260 P. 164 (1927), the Idaho Supreme Court discussed the exigent circumstances under which a court might exercise its inherent power to appoint non-sheriff court attendants:

> The inherent power of courts of record to appoint bailiffs when exigency demands cannot be questioned, but the exigency must arise from some peculiar emergency or where the agency vested by law with the power to appoint has neglected or refused to perform its duty. This principle has been announced in several jurisdictions having statutes identical with or similar to our own ... whereby the business of furnishing the court with attendants is lodged in the sheriff or board of commissioners.

44 Idaho at 744 (emphasis added).

In the Leavitt case, the Idaho Supreme Court reviewed and quoted approvingly from the Montana Supreme Court opinion in State ex rel. Hillis v. Sullivan, supra. In Sullivan, a district judge had appointed a bailiff to serve as a court attendant over the objection of the county sheriff. In ruling that such a decision by the court was an abuse of discretion, the Montana Supreme Court stated:

> These statutes cannot be effectively assailed as invasions of the inherent power of the court, because the power of the court, as organized by the Constitution, did not include the right to appoint attendants without prior recourse to the sheriff and to the county. The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods.

137 P. at 395 (emphasis added).

In the case of Merrill v. Phelps, supra, the Arizona Supreme Court reached the same conclusion. It stated, in part:

> [W]e think that ... it is the duty of the sheriff to provide such attendants for the court, either in person or by deputy, as are necessary ... . Nowhere in the statutes is there any intimation that a judge of the superior court, primarily and of his own initiative, has the duty or the authority to provide ... [attendants] ... for transacting the business of the court.

84 P.2d at 77. Thus, a judge has inherent power to appoint court attendants only "when exigency demands." Leavitt, 49 Idaho at 744. The word "exigency" is defined to cover two situations: (1) "some peculiar emergency," and (2) neglect or refusal by the sheriff to carry out his statutory duties. One obvious example of an "emergency" would be a situation in which the sheriff himself is the investigator, complainant and key witness in a criminal prosecution; under such circumstances, service as court attendant or bailiff to the jury would present a strong conflict of interest and appearance of impropriety.

Another and more frequent situation justifying exercise of the court's inherent authority, is failure by the sheriff to perform the more mundane functions of court attendant.

Conclusion:

From a review of the above cases, it is our opinion that courts do not have the inherent authority to appoint courtroom attendants, whether they are called marshals, special constables, or bailiffs, when statutory authority to perform that function resides with a county sheriff who is willing and able to provide that service. Courts have the inherent authority to appoint court attendants only when the sheriff fails to perform that function or when other exigent circumstances so require.

Question 4:

Turning to the discussion of tort liability for wrongful conduct of court attendants, we note, as we did at the outset, that the duties of court attendants are extremely broad. It takes little imagination to recognize that some of these functions pose serious liability risks. For example, the use of force in maintaining order and security in the court can result in physical injury as well as the denial of liberty interests. Similarly, the use of firearms is governed by a large and continually growing body of case law on the use of deadly force. The court attendant who is called upon to use deadly force must be thoroughly qualified, trained, and prepared to justify his conduct to the most exacting modern standards. The custody and transportation of prisoners is likewise subject to professional standards announced by federal and state court decisions. A cursory understanding of these standards will not adequately prepare an attendant to deal with prisoners. Finally, the service of court-issued process presents risks of false arrest, false imprisonment under color of authority, and again the use of deadly force.

In the rapidly evolving world of Idaho's Tort Claims Act jurisprudence, there are few certainties. Nonetheless, it is our opinion that, because the sheriff has the statutory duty to attend all courts, he is potentially liable for negligently hiring, retaining or supervising court attendants, or for knowingly allowing nondeputized attendants to be negligently hired, trained or supervised.

Clearly, a sheriff who fails to supervise, or who negligently supervises court attendants, is no longer shielded by the fact that his duties are uniquely governmental in nature, with no "parallel function" in the private domain. See, Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986); Jones v. City of St. Maries, 111 Idaho 733, 727 P.2d 1161 (1986).

Less clear is the question whether a sheriff's decision not to carry out his statutory responsibility to serve as or provide attendants to the court can be insulated from liability under the "discretionary function" exception to the Idaho Tort Claims Act. Idaho Code § 6-904(1). The court's recent pronouncements on this topic have left the matter in doubt. On the one hand, the court has interpreted its new "planning/operational analysis" to mean that a governmental entity may be exempt from liability if its failure to perform its statutory duties is the result of a deliberate policy choice resulting from budgetary shortfalls:

> When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. ... [S]uch decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. ... Judicial intervention in such decision-making through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function.

Lewis v. Estate of Smith, 111 Idaho 755, 757, 727 P.2d 1183, 1185 (1986) (quoting approvingly from United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S.Ct. 2755, 2768, 81 L.Ed.2d 660 (1984)).

On the other hand, the court has held that "operational activities," i.e., those "involving the implementation of statutory and regulatory policy--are not immunized and,

accordingly, must be performed with ordinary care." Sterling v. Bloom, 111 Idaho at 229-30, 723 P.2d at 773-74.

The real lesson of the court's recent attempts to clarify the Idaho Tort Claims Act is that what were formerly questions of law to be resolved by a motion for summary judgment to the court, have all become questions of fact to be submitted to a jury. Win or lose, the counties incur major expenses and significant exposure to liability under this scenario.

Finally, we cannot foreclose potential liability for the court itself, if the court takes upon itself the statutory responsibility of hiring, training and supervising court attendants. The question then becomes whether the court's exercise of power in this area is protected by the doctrine of judicial immunity. The general rule is that a court enjoys immunity for "judicial acts" performed in the course of duty. See, Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Such immunity does not attach to "nonjudicial" acts.

The key is whether the act of hiring and supervising court attendants is a "judicial" act. The Seventh Circuit has recently held that a judge's decision to demote and dismiss a probation officer is a judicial act, enjoying immunity from civil suit. Forrester v. White, 792 F.2d 647 (7th Cir. 1986). A strong dissent argued that the employment decisions of a judge acting in an administrative capacity are "nonjudicial" in nature and should not be shielded from tort liability. The U. S. Supreme Court granted a writ of certiorari on February 23, 1987. ___ U.S. ___, 107 S.Ct. 1282, 94 L.Ed.2d 140 (1987).

In Idaho, we can draw guidance from our Supreme Court's recent decision in the case of Crooks v. Maynard, 112 Idaho 312, 318, 732 P.2d 281, 287 (1987). The Court then concluded that "the administrative district judge and/or district judge is not empowered to decide who shall be hired or appointed to serve as deputy clerks, ..." The district court's powers are even more restricted with regard to a sheriff or deputy sheriff because, as the court admonished in Crooks v. Maynard, "the sheriff's office is a county office, unlike the clerk of the district court which is a judicial office created in art. 5." Id.

The Court's decision in Crooks v. Maynard, however, teaches that a bright line does not exist regarding responsibility for

the conduct of court attendants. While hiring is clearly not the province of the court, the courtroom is. Thus, the court can set standards to ensure that the sheriff does not assign "an incompetent, unqualified, irresponsible or untrusty person as a deputy to perform court-related duties." Id. Similarly, if the sheriff "makes an assignment of personnel to a judicial function which the judge finds unacceptable, he [the judge] can refuse to accept that assignment." Id. Finally, the very nature of the office itself means that the sheriff or deputy serving as court attendant must obey "the lawful orders and directions of the courts." Idaho Code § 31-2202(4).

Conclusion.

Because the county sheriff has primary statutory duty to provide court attendants, the sheriff is civilly liable for improper hiring, inadequate training or negligent supervision of such personnel. The county commissioners and the county itself ultimately bear this liability. A judge who attempts to appoint, hire or supervise court attendants in the absence of "exigent circumstances" described above, is exposing himself to potential tort liability in both his individual and official capacities.

SUMMARY:

We have concluded that the county sheriff has primary statutory responsibility for attending all courts held within his county. We have also concluded that there is no statutory authority for the appointment of other court attendants by the court. Courts do, however, have inherent authority to appoint court attendants if the county sheriff fails to serve in that capacity. Several courts around the state have quite properly exercised their inherent authority in this regard and have appointed bailiffs, marshals, or special constables to attend their courts. We stress, however, that there may be serious exposure to tort liability--for the county, the commissioners, the sheriff and the court itself--if these court attendants are empowered to carry firearms, use deadly force, transport prisoners and serve arrest warrants without proper training and supervision.

Guidance for resolving conflicts that arise in this area was enunciated by the Idaho Supreme Court in Crooks v. Maynard:

> Of course, the best policy is for the clerks and judges to work closely together and cooperate in the hiring process to ensure efficiency and effectiveness in the operation of the district courts ...

112 Idaho at 318, 732 P.2d at 287.

Our informal survey shows that the same spirit of cooperation between district courts and county sheriffs already prevails throughout the state. In some instances, the sheriffs fully perform their statutory duties as court attendants. In others, the sheriffs and local administrative district judges "work closely together" to ensure "the smooth, efficient and proper operation of the court system. ..." Id. Generally, this is accomplished by having the sheriff perform the more hazardous duties involved in attending the courts, or having the sheriff deputize, train and supervise those who perform those functions.

One final word. Our research for this opinion has demonstrated that courts and sheriffs throughout the state are reaching common sense solutions to the problem of allocating scarce resources. Generally, the solution has been to appoint bailiffs to act as court crier, serve as courtroom personnel and take charge of sequestering the jury, while having the sheriff assume those duties requiring peace officer status such as serving arrest warrants, transporting prisoners and securing the courtroom from dangerous persons. We strongly recommend that the state's sheriffs and judges seek statutory changes to sanction the arrangements that have spontaneously arisen in this important area.

AUTHORITIES CONSIDERED

Idaho Constitution

Idaho Const., art. 2, § 1

Idaho Const., art. 18, § 6

Idaho Statutes

Idaho Code § 1-103

Idaho Code § 1-2217

Idaho Code § 1-2218

Idaho Code § 1-2219

Idaho Code § 6-904

Idaho Code § 18-3302

Idaho Code § 19-509

Idaho Code § 19-510

Idaho Code § 19-603

Idaho Code § 19-604

Idaho Code § 19-4407

Idaho Code § 19-5101

Idaho Code § 20-601

Idaho Code § 31-2002

Idaho Code § 31-2008

Idaho Code § 31-2202

Idaho Code § 31-2215

Idaho Code § 31-3002 (compared with R.S.§ 2090, and I.C.A. § 30-2502)

Idaho Code § 31-3010 (compared with I.C.A. § 30-2510)

Idaho Code § 31-3011

Idaho Code Annotated § 33-207 (repealed 1970)

Idaho Code § 50-122 (repealed 1969)

Idaho Code § 50-209 (compared with I.C.A. § 49-331, as amended by 1941 Session Laws, ch. 68, p.132)

Idaho Code § 50-344 (repealed 1969)

Session Laws

1970 Session Laws, ch. 120, § 4, p.286

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1967 Session Laws, ch. 429, 455, p.1411

1941 Session Laws, ch. 68, p.132

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Lewis v. Estate of Smith, 111 Idaho 755, 727 P.2d 1183 (1986)

Intermountain Health Care v. Board of County Commissioners of Madison County, 109 Idaho 685, 710 P.2d 595 (1985)

Ketterer v. Billings, 106 Idaho 832, 683 P.2d 868 (1984)

State v. Leavitt, 44 Idaho 739, 260 P. 164 (1927)

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8 C.J.S. Bailiff (1962)

55 C.J.S. Marshal (1948)

80 C.J.S. Sheriffs and Constables §§ 3,29b(1), and 35 (1953)

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