

## Opinion No. 50-5294

May 12, 1950

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** E. R. Cooper Assistant District Attorney Las Vegas, New Mexico

{\*146} I have your letter of May 10, 1950 asking whether or not it is permissible for candidates who have filed for nomination to public office under the direct primary to withdraw as a candidate. You further ask the final date for withdrawal if it is permitted.

The New Mexico Statutes are silent upon this question. However, withdrawals have been made and recognized since the inception of the direct primary system in this state. The general rule is stated in 18 American Jurisprudence, Elections, § 127 as follows:

"A citizen is under no obligation to seek election to office and may be a candidate or refuse to be such at his option. In the absence of statutory provision to the contrary, the mere fact that one has once announced his candidacy for an office does not, {\*147} as a general rule, prevent him from withdrawing as a candidate whenever he sees fit to do so. Thus, it has been held that a candidate whose name has been duly certified for a place on the ballot at a primary election and who has signed the statutory affidavit that if nominated he would accept such nominations, and not withdraw, is not precluded from withdrawing his name before the primary election, although the statute provides that the names of all persons for whom nomination papers have been filed, as certified by the secretary of state, shall be printed on the ballots. The rule in some jurisdictions, however, is that a statement by the candidate that if nominated he would accept, and not withdraw, prevents his withdrawal after nomination. In some jurisdictions the time within which a candidate may exercise his right of withdrawal is regulated by statute. It has been held that voters who have nominated one for public office may not revoke such nomination."

As may be seen from the above, different views are expressed among the various states, largely, of course, on the basis of the language of their particular statutes. It is to be noted that the declaration of candidacy filed in this state does not require the candidate to declare that he will accept the nomination if he is nominated as do the statutes in many states.

The case of Bordwell vs. Williams County Clerk, Supreme Court of California, 159 P. 869, appears to decide the questions contained in your letter. This was a mandamus proceeding, by a duly filed candidate for the nomination of the office of U.S. Senator against the county clerk to compel the clerk to omit from the ballots to be prepared by him for use in the primary election the name of the petitioner. The California procedure is much the same as that of New Mexico. After the final date for filing, the Secretary of State certifies the names of the candidates to the various county clerks who in turn prepare the official ballots in accordance with the listing furnished them by the Secretary

of State. In the Bordwell case, the Secretary of State had issued her certificate containing the name of the petitioner as a candidate. Thereafter the petitioner notified the Secretary of State and all of the county clerks that he had withdrawn as a candidate and directed them not to print or publish his name on the primary ballot.

Regarding the right of a candidate to withdraw the Court stated:

"A citizen, is however, under no obligation to seek election to an office. He may be a candidate, or refuse to be such, at his option, and, in the absence of statutory provisions to the contrary, the mere fact that he has once announced his candidacy for an office does not prevent him from withdrawing as a candidate if he sees fit so to do."

The Court then held that there was nothing in the California statutes which prohibited such a withdrawal. A search through the New Mexico statutes likewise indicates no such prohibition. The Court then considered the question of the timeliness of the petitioner's request of withdrawal. It was held that although the County Clerk was required by statute to print those names which had been certified by the Secretary of State, the candidate could nevertheless by proper notification to the county clerk cause his name to be omitted from the ballot. The court did not specify the exact deadline for notification of the county clerks but set forth the rule as follows:

"It need hardly be said that an application of this kind {*\*148*} must be made sufficiently early to enable the officials to have the necessary alterations put into effect."

In New Mexico the preparation of ballots is governed by § 56-811, New Mexico Statutes Annotated, 1941 Compilation, which, insofar as is material provides:

"Not less than twenty (20) days before the date of the primary, the county clerk of each county shall group all the candidates for each party by themselves and prepare at once, in writing, a separate ballot for each part, and have such ballots printed \* \* \*".

If the ballots have not as yet been printed within the time above mentioned, it would seem that it would be possible for a candidate to have his name stricken from the list. To be completely safe, however, a candidate should notify the county clerks at least twenty days before the date of the primary of his desire to withdraw from the race in which he is filed as a candidate.

Your attention is also called to § 56-810 of the 1941 Compilation which requires the Secretary of State within five days after the deadline for filing to transmit a list of all candidates for state and district offices to the proper county clerks. If a person wishes to withdraw from any of these races, withdrawal could be made by simply notifying the Secretary of State if it was done prior to the issuance of the certificate mentioned in that section.

It is, therefore, my opinion that a candidate for office under the direct primary system has the right to withdraw his candidacy providing that he does so before the official

ballots have been printed. If the office in question is one where the declaration was originally filed with the Secretary of State, notice may only be given to the Secretary of State if the withdrawal is made before the Secretary of State issues her certificate. If the office is a county office, or if the withdrawal is made after the issuance of the Secretary of State's certificate, notice must be given to county clerks of all counties whose electors are entitled to vote for county offices in question.