

Opinion No. 54-5955

May 25, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Bertrand B. Prince District Attorney Santa Fe, New Mexico

{*411} Sometime ago you addressed an inquiry to this office concerning whether or not a Probate Judge may also hold the position of Assistant District Attorney. The question is whether or not the two positions are incompatible, and if such duties are {*412} incompatible the two positions cannot be held by the same person.

Section 17-102, N.M.S.A., 1941 Comp., reads as follows:

"Assistant district attorneys -- Appointment -- Qualifications -- Oath -- Revocation of appointment -- Duties. -- Each district attorney in this state may appoint a suitable person who must be an attorney at law practicing his profession in this state and a member of the bar of this state, and a citizen and resident of the district wherein such district attorney resides, to be his assistant. Every appointment of an assistant district attorney shall be in writing under the hand of the district attorney and filed in the office of the clerk of the district court of the judicial district wherein the district attorney resides, and the person so appointed shall take and file in the office of the clerk of the district court of the judicial district wherein the district attorney resides, an oath of office as is now prescribed by law for district attorneys before entering upon his duties as such assistant district attorney. Every such appointment may be revoked by the district attorney making the same, which revocation shall be in writing and filed in said clerk's office. **Such assistant district attorney may attend the meetings of the boards of county commissioners, the district court, justice and probate courts in such district attorney's district, and therein discharge any duties imposed by law upon or required of the district attorney by whom he was appointed.**"

It is obvious that this law contemplates appearances before the Probate Court by the District Attorney and his assistants. The case of **Haymaker v. State ex rel. McCain**, 22 N.M. 400, 163 P. 248, LRA 1917D 210, holds that where one function is dependent upon a decision of the same person holding another function that such jobs are incompatible.

Therefore, it is the opinion of this office that a person who is Probate Judge may not also be appointed to the position of Assistant District Attorney by reason that his duties as a representative of the State would require his appearance in many matters before himself as presiding Judge of the Probate Court. This is not only violative of the laws of the State of New Mexico but would also be a violation of the legal canons of ethics.

We sincerely hope that this answers your inquiry.

By: Fred M. Standley

Assist. Attorney General