

Opinion No. 56-6565

December 31, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Dan M. Smith, Jr., State Comptroller, State Capitol Bldg., Santa Fe, New Mexico

We have your letter of September 27th, requesting an opinion from this office upon the following question:

"May a district attorney charge a fee for services rendered the county commissioners in connection with a county hospital bond issue?"

We are of the opinion that a district attorney can not charge the county a fee for the services which he may render in connection with a county hospital bond issue.

Section 17-1-11 prescribing the duties of the district attorney reads as follows.

"It shall be the duty of the district attorney:

1. To prosecute and defend for the state in all courts of record of the counties of his district, all cases, criminal and civil, in which the state or any county in his district may be a party, or may be interested or concerned;
2. To represent the county before the board of county commissioners of any county in his district in all matters coming before such board, whenever he is requested to do so by the board of county commissioners and he may appear before such board when sitting as a board of equalization without such request;
3. To advise all county and state officers whenever such advice is requested;
4. To represent any county in his district in civil cases in which such county may be concerned in the supreme court; this provision, however, not to apply to suits brought in the name of the state.

Note that subsections 2 and 3 call for the district attorney to "represent the county" and "Advise county Officials." We believe that these terms are used in the generally accepted sense, namely, the district attorney is to serve as attorney for the county in all matters when called upon to so act. The legislature intended to make the district attorney the attorney for the counties of his district. This is clear when we consider the whole statute. In the first section the district attorney is given the duty to prosecute and defend all cases, criminal and civil, in which the county is a party or has an interest. This certainly makes the district attorney the trial lawyer for the county. It is to be noted further that the fourth section provides that the district attorney is the appellate lawyer

for the county in all civil cases wherein the county may be concerned except such suits brought in the name of the state. It seems clear that the legislature intended that the district attorney was to be the trial attorney for the counties in his district.

The subsections 2 and 3 were placed in the statute to cover legal work other than the trial of a case. These were intended to provide the county with complete legal services by the district attorneys. Therefore, whenever the county commissioners request representation in any matter before them, it is the duty of the district attorney to act for such county. It is hardly open to question that the preparation of the necessary legal papers for a bond issue would be a matter before the board of county commissioners. Equally it does not seem open to question but that in this case the district attorney was requested to act for the county.

The next question is, can the county commissioner employ the district attorney in his private capacity as an attorney to perform the necessary legal services connected with the bond issue?

We do not believe that the county commissioners can employ the district attorney as a private attorney to perform this work. In other words, any relation involving legal work between the district attorney and the county commissioners can only be on the basis of the district attorney acting in his official capacity. To hold otherwise would be to allow the district attorney to avoid the duties imposed by § 17-1-11 and at the same time allow him to obtain a fee as a private attorney for the performance of the same work which the statute fixes as his official duty.

There can be no doubt that as district attorney an additional fee can not be accepted. This is precluded by § 9 Art. XX of the constitution and § 17-1-4, each of which reads as follows:

"No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance, or emoluments for or on account of his office, in any form whatever, except the salary provided by law."

"No district attorney shall receive to his own use any salary, fees or emoluments other than as herein prescribed. No other or additional allowance shall be made or paid for or on account of any assistant or assistants heretofore or hereafter appointed by any district attorney."

For these reasons we conclude that a district attorney is not entitled to any additional fee for legal services for a County Hospital Bond Issue.

By: Paul L. Billhymer

Assistant Attorney General