

## Opinion No. 59-47

May 5, 1959

**BY:** FRANK B. ZINN, Attorney General

**TO:** Raymond E. Keithly District Attorney Seventh Judicial District Truth or Consequences, New Mexico

The District Attorney is not obligated to represent a county sheriff in a civil suit.

The District Attorney is required to represent a Soil Conservation District in collecting for work done by the Soil Conservation District for members of their organization.

Upon request by the Welfare Department, a District Attorney must assist in paternity determinations if the child is likely to be a public charge.

### OPINION

{\*72} I have your opinion request in which you ask; whether your office may represent a County Sheriff who has been sued arising out of a criminal action; whether you may officially render legal services in collecting money due a Soil Conservation Committee for work done by them for members of their organization; and lastly, whether the Welfare Department may call upon your office to seek a paternity determination.

It is my opinion that you are not authorized to represent the sheriff in a civil suit arising out of the performance of his duties. You are authorized to represent Soil Conservation Districts in collecting for work done by their office for members of their organization. Your office can be called upon by the Welfare Department to seek a judicial determination of paternity if the child is or is likely to be a public charge.

To answer all of the questions raised by your inquiry regarding services to be rendered by your office in particular instances, it {\*73} is necessary to seek constitutional or statutory authority vesting your office with the power and duty to act in a given matter. As a general rule, District Attorneys have no common law powers and must function in accordance with the authority specifically or impliedly conferred upon that office by the state statutes or Constitution. I say impliedly since, your duties as District Attorney are not limited to those expressly imposed upon that office by statute. See **Hanagan v. Board of County Commissioners of Lea County**, 64 N.M. 103, 325 P. 2d 282.

Your attention is directed to Article VI, Section 24, Paragraph 1 of the Constitution of New Mexico which states in part:

"There shall be a district attorney for each judicial district, who shall be learned in the law, and who \* \* \* shall be the law officer of the state and of the counties within his

district, \* \* \* and shall perform such duties and receive such salary as may be prescribed by law."

Section 17-1-11 N.M.S.A. 1953 Compilation states in part:

"It shall be the duty of the district attorney:

\* \* \*

3. To advise all county and state officers whenever such advice is requested;"

In addition to the foregoing Constitutional Section and Section 17-1-11, supra, Section 22-4-8 N.M.S.A., 1953 Compilation, provides that the District Attorney may bring a proceeding to compel support in the name of the State of New Mexico by way of a paternity suit if the child is or is likely to be a public charge. Section 45-5-8 N.M.S.A. 1953 Compilation, 1957 Pocket Supplement, with reference to Soil Conservation Districts relates that district soil conservation supervisors may call upon the District Attorney for the county within which the lands of the Soil Conservation District may be located, for such legal services as they may require. No specific statute requires that you represent a sheriff in a civil suit arising out of his acts taken in conjunction with a criminal action, although Section 17-1-11 requires that you **advise** all county and state officials whenever such advice is requested which would ordinarily include the sheriff.

Civil actions against public officials are predicated upon some behavior generally in excess of their usual authority even though done while in office or ostensibly carrying out their duty. The act for which liability is sought to be imposed being in excess of their authority is also an act beyond your responsibility as counsel.

The 24th Legislature has recognized a need for official representation of peace officers and others when they become involved as defendants in civil actions arising out of the performance of their official duties. Chapter 45 of the Laws of 1959 which was effective on March 10, 1959, authorizes the Attorney General to represent state and county officers in such suits. The law is not retroactive and would cover only a suit filed subsequent to the effective date of the act.

It is my opinion that you are not authorized to officially provide the services desired by the former sheriff. It is my view that if the Legislature had intended that you, as District Attorney, represent County Sheriffs in such instances, the duties would have been specifically provided for in statute.

Fred M. Calkins, Jr.

Assistant Attorney General