

Opinion No. 61-88

September 19, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A. Donnelly, Assistant Attorney General

TO: Mr. Alexander F. Sceresse, District Attorney, County Courthouse, Albuquerque, New Mexico

QUESTION

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1. Does Section 40-22-11, N.M.S.A., 1953 Compilation give the District Attorney the same powers to examine witnesses prior to the filing of criminal charges as does Section 41-3-8, N.M.S.A., 1953 Compilation, (P.S.) (second paragraph), although Section 40-22-11 deals with a District Court misdemeanor?
2. If the District Attorney has powers to examine witnesses concerning gambling situations, what is the approved procedure for examining witnesses?

CONCLUSIONS

1. No.
2. See analysis.

OPINION

ANALYSIS

Section 40-22-11, N.M.S.A., 1953 Compilation provides:

"Any court, officer, tribunal or grand jury having jurisdiction of the offenses enumerated in this chapter (40-22-1 to 40-22-12) or any district attorney may subpoena persons and compel their attendance as witnesses, and compel them to testify as to any violation of this act. Any person so summoned or examined shall not be liable to prosecution for any violation of this act by the unsupported testimony of any accomplice or participant."

Under provisions of the applicable portion of Section 41-3-8, 1953 Compilation, as amended, it is provided:

"The prosecuting attorney, may on approval of the district judge, issue subpoenas in felony cases and call witnesses before him when the grand jury is not in session and have them sworn and their testimony reduced to writing and signed by the witnesses, at

the cost of the county, and when taken shall file the same with the clerk of the district court, to be used for impeachment purposes only. Such examination must be confined to some felony committed against the statutes of the state and triable in that county, and the evidence so taken shall not be receivable in any civil proceeding. A refusal to obey such subpoena or to be sworn or testify may be punished as a contempt on complaint and showing to the district court, that proper cause exists therefor. If the prosecuting attorney calls or examines any witnesses in violation of the provisions of this paragraph, he shall be guilty of a felony, and the cost of taking such testimony shall be taxed to him and deducted from his salary before it is paid to him.

After comparing these two sections we conclude that Section 40-22-11, N.M.S.A., 1953 Compilation, does not empower district attorneys with the same authority to issue subpoenas or to call witnesses before him for the taking of testimony and to have such testimony reduced to writing and signed by the witness, as is specifically provided in Section 41-3-8, N.M.S.A., 1953 Compilation, as amended, for cases involving felonies.

The concluding paragraph of Section 31-2-8, N.M.S.A., 1953 Compilation, as amended, provides that there shall be no preliminary examination in misdemeanor cases, and the language under this section specifically limits the authority of district attorney's to issue subpoenas, call witnesses, and produce their sworn statements to writing, to cases involving felonies. Similarly, in analogous situations, it has been held in decisions found in other jurisdictions, that the right to take oral testimony by means of a deposition in a criminal case would not exist under the common law rules of procedure and such right is therefore dependent upon the existence of express statutory provision. Ann Cas. 1916 A, 1069. And, in the absence of such authority, such right is generally limited. The general rule in this respect is cited in 16 Am. Jur., "Depositions," Section 12 at page 704, wherein it is provided: "Such statutes being in derogation of the common law are strictly construed."

Therefore, a close study of the statutory language contained in Section 40-22-11, N.M.S.A., 1953 Compilation, leads us to the conclusion that the powers vested in district attorneys under the provisions of this section, are limited to situations wherein the witnesses are brought before a grand jury, or are subpoenaed to testify as to alleged violations of the gaming laws of this state as provided in Sections 40-22-1 through 40-22-23, N.M.S.A., 1953 Compilation, as amended, at the time of trial.

In respect to your second question our answer to your first inquiry is dispositive of this matter.