

## **Opinion No. 70-64**

July 15, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** Mr. John E. Conway City Attorney City of Alamogordo P.O. Box 750 Alamogordo, N.M. 88310

### **QUESTIONS**

#### QUESTIONS

1. Is there any conflict of interest with an attorney handling the City's matters for his law firm while running for state senator?
2. If elected, would there be any conflict with the law firm continuing to represent the city with the understanding that while the state senator is in session, one of the other partners would be primarily responsible for the City's work and after the legislative session is over, he would again take over the work?

#### CONCLUSIONS

1. No.
2. No.

### **OPINION**

#### **{\*108} ANALYSIS**

There is no statutory prohibition which would prevent you from acting as City Attorney while running for public office. The only problem might arise after you are elected.

A state senator is a state officer, hence there are three sections of New Mexico Statutes Annotated, 1953 Comp. pertinent to your question.

Section 2-1-4, N.M.S.A., 1953 Comp. provides that:

From and after January 1, 1945, {\*109} it shall be unlawful for any member of the legislature, during the term for which he is elected to contract for or receive any compensation for services performed as an officer or employee of the state, except such compensation and expense money as he is entitled to receive as a member of the legislature.

Section 2-1-5, N.M.S.A., 1953 Comp. provides that:

From and after January 1, 1945, it shall be unlawful for any officer of the state of New Mexico to pay any member of the legislature compensation for services rendered to the state of New Mexico as an officer or employee thereof during the term for which such legislator was elected except such compensation and expense money which such member is entitled to receive as a member of the legislature.

Section 2-9-16, N.M.S.A., 1953 Comp. dealing with qualifications for the office of state senator provides that:

No person shall be eligible to serve in the senate who, at the time of qualifying holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary.

The above quoted sections specifically refer to state, county or national offices. As pointed out in Attorney General Opinion No. 57-93, issued May 8, 1957, a state representative when working for a municipality, is paid out of municipal funds and is not an employee paid out of state funds. The source of income alone, however, is not the sole test. The duties as a municipal employee would be purely local in character.

Article IV, Section 28 of the New Mexico Constitution reads as follows:

No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

The application of this provision depends upon the definition given to the term "civil office." The criteria for making this kind of determination are found in **State ex rel. Gibson v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1937). That case specified five necessary elements:

The office must be created by the Constitution or by the Legislature or by a municipality or other body through the authority of the legislature; it must possess a delegation of a portion of the sovereign power of the government, to be exercised for the benefit of the public; the power conferred and the duties to be discharged must be defined, directly or impliedly by the Legislature; the duties must be performed independently without control of a superior power, other than the law, unless they be those of an inferior and subordinate office, created or authorized by the Legislature and by it placed under the control of a superior officer or body; it must have some permanency and continuity, and not be only temporary or occasional. (40 N.M. 288)

The office of city attorney does not qualify as a "civil office" for several reasons. The city attorney's position is created and the duties defined by the governing body of the

municipality. He acts on behalf of the city, but he himself does not possess a delegation of a portion of the sovereign power of the government. The city exercises the sovereign power by creating the office. Also, in this particular case, since your law firm is retained by the city, the job is actually only temporary and occasional.

Aside from these considerations, a determinative factor in considering the incompatibility between two offices is the particular nature of the jobs. If the duties of the two positions, either {*\*110*} public or private, are such that the public job, in this case the office of state senator, cannot be efficiently discharged, then the duties of the two positions render them incompatible. See Attorney General Opinion No. 63-133, issued October 2, 1963 and Attorney General Opinion No. 63-23, issued March 27, 1963. We see no incompatibility here however, especially in view of the fact that your firm will take over the business of the city while you are in office.

In an action to determine whether a state senator was prohibited from holding the position of city attorney a New Jersey court held that there was no conflict between the two offices in the traditional application of the doctrine of incompatibility. Since the possibility of conflict lies in the area of interest rather than the duties of office, if an attorney was specifically charged with a duty to lobby, there would be a conflict. **Reilly v. Ozzard**, 166 A.2d 360, 33 N.J. 529 (1960). In that case, and in this instance also however, lobbying was not specified as a duty of the city attorney and so there was no conflict of interest.

It is our conclusion, then, that you may run for public office while serving as city attorney, and that your firm may continue to handle the city's business if you are elected state senator.

We suggest, however, for your benefit, that you refer to Article IV, Section 28 of the New Mexico Constitution and the Conflict of Interest Act, Section 5-12-2, N.M.S.A., 1953 Comp. which deal with conflict of interest problems that might occur while you are in office, such as state contracts or legislation which might concern the municipality.

The Attorney General is authorized to render formal and official opinions only to those public officials set forth in Section 4-3-2 D, N.M.S.A., 1953 Compilation. Necessarily, therefore, the foregoing is not to be considered an official opinion of the Attorney General but is an informal and unofficial expression of view given with the desire to be helpful to you.

By: Gary O'Dowd

Deputy Attorney General