Opinion No. 71-95

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BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. John G. Jasper Attorney New Mexico Legislative Council 334 State Capitol Santa Fe, New Mexico 87501

QUESTIONS

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May an elected and acting district attorney also act under appointment as a city attorney for a city within his district for compensation?

CONCLUSION

No.

OPINION

*{*138}* **ANALYSIS**

The recognized rule on the issue of incompatibility between public offices was adopted by New Mexico in **Haymaker v. State ex rel. McCain,** 22 N.M. 400, 168 P. 248 wherein the Supreme Court said:

"The incompatibility between two offices, which upon the acceptance of one by the incumbent of the other *{*139}* operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both"

Such incompatibility is to be found in the character of the offices and their relation to each other, and in the nature of the duties and functions which attach to them. **Knuckles v. Board of Education,** 272 Ky, 431, 114 S.W.2d 511. Offices are incompatible where such duties and functions are inconsistent and repugnant. **Haymaker v. State ex rel. McCain, supra.** Under **Haymaker,** incompatibility of office results from physical impossibility to discharge the duties of both offices or where one is subordinate to the other or where contrariety and antagonism would result in attempting to faithfully and impartially discharge the duties of both offices by the same person. The offices are incompatible if there is a reasonable **possibility** of a situation arising which would cause contrariety of antagonism if one person attempted to faithfully and impartially discharge the duties of both offices.

The duties of the district attorney are enumerated in Section 17-1-11, N.M.S.A., 1953 Comp., which provides:

"Duties of district attorney. -- Each district attorney shall:

A. 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;

B. Represent the county before the board of county commissioners of any county in his district in all matters before the board whenever requested to do so by the board, and he may appear before the board when sitting as a board of equalization without request;

C. Advise all county and state officers whenever requested; and

D. Represent any county in his district in all civil cases in which the county may be concerned in the Supreme Court or court of appeals, but not in suits brought in the name of the state."

Section 14-11-4, N.M.S.A., 1953 Comp. provides for the appointment of municipal attorneys:

"B. The governing body may also provide for the office of an attorney."

No duties are detailed in the statutes for municipal attorneys, though of necessity it includes advice, the preparation of indispensable instruments, and the prosecution of the civil and criminal business of the city. **Reilly v. Ozzard,** 33 N.J. 529, 166 A.2d 360. Obviously, the post of city attorney is as broad as the governing body of the city wishes to make it. Not infrequently he will be engaged for services beyond his professional franchise, and such may be rendered because they are not as such a part of the practice of law, but rather because an attorney is not restricted to the practice of his profession only. **Reilly v. Ozzard, supra.** The professional responsibilities of an attorney are high. His relationship with his client is highly fiduciary in its nature and of a delicate, exacting and confidential character requiring a high degree of fidelity and good faith. **Cooper v. Bell,** 127 Tenn. 142, 153 S.W. 844. An attorney must faithfully, honestly, and consistently represent the interests and protect the rights of his client, he must discharge his duties to his client with the strictest fidelity, observe the highest and upmost good faith toward him and obey his lawful directions. He is not allowed to divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relation, unless he is authorized to do so by the client himself. **Cooper v. Bell, supra;** 5 Am. Jur., **Attorneys at Law.,** § 46.

The office of district attorney and city attorney within that district are patently incompatible. An examination of the character of the offices and their relation to each other makes it clear that the holding of both positions by one individual is improper as a matter *{*140}* of law, as well as a matter of ethics for one who is an attorney. Obviously,

their duties conflict. In the criminal area there is a question where the city attorney's jurisdiction ends and the district attorney's jurisdiction begins as a matter of practicality. In the first instance, it is the prosecutor's judgment to determine whether or not an individual will be charged with a petty misdemeanor or felony. Further, there is always a possibility of the need to prosecute a city official acting in a manner that might also precipitate civil litigation against that city, an embarrassing position at best for that district attorney who must prosecute the individual with the full knowledge that he will later possibly be defending the city on the basis of the same fact situation, though the fact of conviction cannot be used in the civil litigation. The relations between city and county government is by its very nature filled with contrariety and antagonism. Disputes may and often do exist in the incorporation of new municipalities, the annexation of land adjacent to municipalities, collection of certain taxes such as the occupation tax, planning, zoning, and questions concerning entry into joint powers agreement where by statute both parties must be separately represented. The law is clear that incompatibility of offices exist if there is a reasonable possibility of any situation arising which would cause contrariety or antagonism in the discharge of both by one individual. Further, it is immaterial to the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices. **State ex. rel. Metcalf v. Goff,** 15 R.I. 505, 9 A.226; 42 Am. Jur., **Public Officers,** § 70.

Attorney General Opinion 62-98 held that the offices of assistant district attorney and city attorney were not incompatible if "the duties of both may be efficiently discharged." Since this opinion did not address itself to the question of contrariety or antagonism it does not control here.

In **State ex rel. Chapman v. Trudder,** 35 N.M. 49, 289 P. 594 (1930), the Supreme Court considered the incompatibility of the offices of district attorney and mayor of Las Vegas, New Mexico. The trial court had concluded that the two offices were incompatible and it was argued on appeal that there was a conflict inasmuch as the district attorney could conceivably be required to present an accusation for removal against the mayor under the removal statutes then in effect. The Supreme Court disregarded that argument saying the "general duty of a district attorney to investigate and initiate criminal charges against law violators does not seem to rest upon him under the statute for removal of officers," and the court said further that it did not appear that the public interest would suffer from the lack of a procedure for removal of the mayor if the district attorney should be the incumbent in both offices. The court stated:

"This is not like a case where one officer has the power to exercise his discretion of removal of another. The district attorney has no power to remove the officers named in the removal statute. He may only present charges based upon sworn evidence presented to him. If the district attorney should then fail to proceed, the offending officer is not thereby immune."

The court apparently based its opinion on the fact that the district attorney was not charged with the responsibility of initiating removal proceedings and that other officers

could proceed with them should the occasion require. The office and the functions of mayor are in no way comparable to those of the office of city attorney in its relation with that of district attorney. The **Trudder** case is clearly distinguishable on its facts.

Section 5-3-1, N.M.S.A., 1953 Comp. provides that any county, precinct, district, city, town or village elected office becomes vacant by "an officer accepting and undertaking to discharge the duties of another incompatible office."

Section 14-1-6, N.M.S.A., 1953 Comp. provides that:

D. Subject to the limitation of a merit system ordinance adopted as authorized in Section 14-12-4, *{*141}* N.M.S.A., 1953 Compilation:

(1) the governing body may discharge an appointed official or employee by a majority of all the members of the governing body;

(2) the mayor may discharge an appointed official or employee upon the approval of a majority of all the members of the governing body; or

(3) the mayor may suspend an appointed official or employee until the next regular meeting of the governing body at which time the suspension shall be approved or disapproved by a majority of all the members of the governing body. If the suspension of the appointed official or employee is disapproved by the governing body, the suspended appointed official or employee shall be paid the compensation he was entitled to receive during the time of his suspension."

Section 14-9-8, N.M.S.A., 1953 Comp. limits removal of elected or appointed **municipal** officers to malfeasance in office.

In circumstances such as your question refers, the incompatibility should be approached as follows:

(1) As to the position of city attorney, it is incumbent upon the mayor and governing body of the municipality to act under Section 14-1-6 or 14-9-8, **supra.** A vacancy clearly exists under the ruling of the **Haymaker** case if the district position was assumed while holding the city attorney job.

(2) As to the district attorney position, under Section 5-3-1, **supra,** a district position would normally become vacant upon the accepting and undertaking the duties of another incompatible office. This provision does not apply to the office of district attorney under **State ex rel. Prince v. Rogers,** 57 N.M. 686, 262 P.2d 779 (1953), wherein the Supreme Court said that Chapter 36, Laws 1909, § 10-303, 1941 Comp. (5-3-3), was not intended to embrace the district attorney because when the law was passed, the district attorney was an officer appointed by the governor, and was not an elected officer. (In 1911 the constitution was adopted providing for the election of district attorneys in Art. 6, Sec. 24.) The court in **Prince v. Rogers, supra,** was of the divided

opinion that the district attorney was not amenable to removal as a state officer under Art. IV, Sec 36 of the Constitution. The court was, however, of the majority opinion that the district attorney was removable under § 7, Chapter 54, Laws 1913, § 17-109, 1941 Comp., for willful neglect of the discharge of the duties of his office. This section was repealed by Laws 1968, Chapter 69, § 69 and removal is now provided for by Section 17-1-9.1, N.M.S.A., 1953 Comp., which specifies:

"REMOVAL FROM OFFICE -- GROUNDS ENUMERATED. -- Any district attorney may be removed from office according to the provisions of this act [17-1-9.1 to 17-1-9.9] on any of the following grounds:

1. Conviction of any felony or of any misdemeanor involving moral turpitude;

2. Failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;

3. Knowingly demanding or receiving illegal fees as such officer;

4. Failure to account for money coming into his hands as such officer;

5. Gross incompetency or gross negligence in discharging the duties of the office;

6. Any other act or acts, which in the opinion of the court amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office."

Where a district attorney's term is fixed by law the office cannot be declared vacant except as provided in the constitution and statutory provisions. **People v. Jackson,** 48 N.Y.S.2d 401. Further, the district attorney cannot be removed at the pleasure of the executive. **Territory v. Mann,** 16 N.M. 211, *{*142}* 114 P. 362 (1911).

If incompatible offices of district and city attorney are maintained, there are several courses of action which may appropriately be pursued. If the city position was assumed first, an action would lie against the city to prohibit salary payment for an office which is vacant by operation of law. If the city position was assumed subsequent to the district office, there being no vacancy created in the district office under the ruling in **Prince,** grounds for removal exist under Section 17-1-9.1 (2), **supra,** there being a duty devolving upon the district attorney to avoid holding incompatiable offices. The courts have stressed that public officials should avoid not only real conflicts of interest, but apparent conflicts of interest as well. **Griggs v. Princeton Borough,** 33 N.J. 207, 162 A.2nd 862 (1960). Further, in view of inherent incompatibility of the offices, and the fact that they are held only by members of the Bar, there is a serious question concerning professional ethics, a matter that should be referred to the Bar Association of this state for consideration.

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