Opinion No. 77-07

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OPINION OF: Toney Anaya, Attorney General

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TO: Al Romero, Chief, Local Government Division, Dept. of Finance & Administration, Capitol Building, Santa Fe, New Mexico 87501

LEGAL REPRESENTATION OF COUNTIES-DISTRICT ATTORNEYS-LIMITATION OF PRIVATE PRACTICE-CLASS H COUNTIES. - An attorney who is engaged in the private practice of law may not be retained to render legal services to counties after January 1, 1977 with the exception that an incorporated Class H County may employ legal counsel other than the Attorney General or the District Attorney.

QUESTIONS

1. May an attorney who is engaged in the private practice of law be retained to render legal services to counties after January 1, 1977?

2. May an incorporated Class H county employ legal counsel other than the Attorney General or the District Attorney?

CONCLUSIONS

1. No.

2. Yes.

OPINION

Question No. 1.: It has been the practice among certain District Attorneys to appoint attorneys engaged in the private practice of law to render legal services to counties within the jurisdiction of the District Attorney making such appointment. It has also been the practice of certain county commissions to retain counsel who are engaged in private practice to render legal advice to a county. The continuation of these practices beyond January 1, 1977 has been foreclosed.

Section 17-1-12, NMSA 1953 Comp., provides in pertinent part:

No one shall represent the state or any county thereof . . . except the attorney general, his legally appointed and qualified assistants or the district attorney or his legally appointed and qualified assistants, and such associate counsel as may appear on order

of the court, with the consent of the attorney general, or district attorney. (Emphasis added.) Laws 1933, Ch. 21, Section 7.

Section 17-1-3.1, NMSA 1953 Comp. (DISTRICT ATTORNEYS-LIMITATION OF PRIVATE PRACTICE), as amended in 1975, provides:

After January 1, 1977, no district attorney or assistant district attorney shall engage in the private practice of law. Violation of this section is ground for removal from office. Laws 1975, Ch. 302, Section 1.

The 1975 Legislature also amended Section 17-1-5, NMSA 1953 Comp. (DISTRICT ATTORNEYS-PAYMENTS OF SALARIES AND EXPENSES) to include the following language:

Nothing in this section shall be construed to prevent an agreement between an incorporated municipality or a county and a district attorney whereby the district attorney agrees to assign an assistant to the municipality or county and a municipality or county agrees to reimburse the department of finance and administration to the credit of the district attorney's budget for all or a portion of the assistant's salary or expenses. (Emphasis added.) Laws 1975, Ch. 302, Section 3.

The fundamental rule in construing statutes is to ascertain and carry into effect the legislative intent. Since these statutes deal with the same subject (District Attorneys and their assistants), the "pari materia" rule applies in ascertaining and effectuating such intent. State v. Chavez, 80 N.M. 340, 455 P.2d 844 (1969); State v. Gonzales, 78 N.M. 218, 430 P.2d 376 (1967). Statutes are presumed to be enacted by the legislature with full knowledge of all statutes in "pari materia" regardless of whether such statutes were enacted at the same legislative session. Therefore, statutes dealing with the same subject *{*90}* matter should be construed together as though they constituted one law, thereby giving effect to each. State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969); New Mexico Municipal League, Inc. v. New Mexico Environmental Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Applying these rules of statutory construction, it is clear that a District Attorney's duty to render legal services to a county may not be performed by appointing private counsel as a part-time Assistant District Attorney to render such services. A District Attorney may, however, enter an agreement with the county whereby the District Attorney agrees to assign one of his full-time assistants to perform legal services for the county and such county agrees to reimburse the District Attorney's Office for the cost of such services. See Section 17-1-5, supra.

In the absence of a court order pursuant to Section 17-1-12, supra, counties may no longer hire private attorneys to serve as their counsel, even though they may seek to have such attorneys designated as special assistant district attorneys. Sections 17-1-3.1 and 17-1-5, supra. This conclusion is also compelled by an analysis of the powers of county governments. A county is but a political subdivision of the state and it possesses

only such powers as are expressly granted to it by the legislature, together with those implied powers necessary to implement the express powers. El Dorado at Santa Fe, Inc. v. Board of County Comm'rs of Santa Fe County, State Bar of N.M. Bull., Vol. 15, No. 7 at 1310; Dow v. Irwin, 21 N.M. 576, 157 P. 490 (1916).

Express statutory authorization of the county's power to hire private counsel must be found, if at all, under Section 15-36A-1, NMSA 1953 Comp. (COUNTIES-POWERS-ORDINANCES) and Section 14-11-4, NMSA 1953 Comp. (GOVERNING BODY TO PROVIDE FOR CREATION OF CERTAIN APPOINTIVE OFFICES). Section 15-36A-1, supra, provides in pertinent part:

All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in this grant of powers to the counties are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants. . . . (Emphasis added.) Laws 1975, Ch. 312, Section 1.

Section 14-11-4, supra, provides in pertinent part:

B. The governing body (of each municipality) may also provide for the office of an attorney . . .

Section 15-36A-1, supra, does not give a county the express power to retain private counsel to render legal services to the county since such power is "inconsistent with statutory . . . limitations placed on counties" by Section 17-1-12, supra. The 1975 amendments to Sections 17-1-3.1 and 17-1-5, supra, *{*91}* combined with Section 17-1-12, supra, clearly deny all counties any authority under Section 15-36A-1, supra, to hire private attorneys as counsel.

Based upon the New Mexico Supreme Court's interpretation of Section 17-1-12 in State v. Davidson, 33 N.M. 664, 275 P. 373 (1929), the argument could be raised that neither a District Attorney nor a county is precluded from hiring attorneys engaged in the private practice of law if the object of such employment is to obtain legal "advise" or other legal services not involving an appearance in court or before some other tribunal. However, an analysis of the Davidson opinion, and the application of fundamental rules of statutory construction clearly indicate the legislature did not intend such a result.

The Davidson case involved a suit by the State of New Mexico to enjoin the payment of public money to an attorney engaged in the private practice of law as compensation for certain legal services rendered by him in 1927 as a "special counsel" to the State Highway Commission. The State argued that such payment was impermissible because:

(1) the employment of "special counsel" by any agency of the State was an intrusion upon the common law powers and duties of the Attorney General and thus could not be constitutionally permitted by statute;

(2) the employment of "special counsel" by the State Highway Commission was beyond the power conferred upon it by law; and

(3) the employment of "special counsel" was prohibited by Section 17-1-12, supra, as it then existed, in the absence of an order of a court.

In response to the first contention advanced on the part of the State, the Court determined that the Attorney General did not have common law powers because his duties had been enumerated by statute long prior to the adoption of the common law in this jurisdiction.

With respect to the second contention advanced on the part of the State, the Court noted that the State Highway Commission had the statutory authority:

. . . to employ such experts and temporary employees as may be necessary, and to also employ such "other help, as may be necessary to the proper conduct of the work of the commission." State v. Davidson, supra, 33 N.M. at 669-670.

In determining whether this language authorized the employment of "special counsel," in the absence of specific mention of such persons in the statute, the Court considered the circumstances which existed at the time the statute was enacted in 1917. In this regard, the Court found that the State Highway Commission was charged by the Legislature with the performance of extensive duties of a business nature involving, among other things, the expenditure of large sums of money with respect to which the State Highway Engineer was required to give bond to secure the State against misappropriation of *{*92}* departmental funds. The Court further observed with reference to the statutory authority of the State Highway Commission that:

The needs of the highway department in regard to legal services are much broader in their scope than the statutory duties of either the attorney general or the district attorneys of the state. The other manifold duties imposed by law upon those officials are such that it would be impossible for them to care for the legal needs of the highway department and it thus became impossible for the department to properly discharge its duties without the employment of special counsel.

. . . It must be self-evident that the highway department could neither safely nor efficiently discharge the dusties thus imposed upon it without the constant legal assistance of a competent attorney . . . . It is a general rule of statutory construction that, where the legislature imposes specific duties upon an agency of the state for the purpose of accomplishing specific objects, it thereby confers by implication all powers necessary to the proper discharge of those duties. . . .

As we have heretofore stated, the needs of the highway department in the way of legal assistance extend beyond the scope of the duties of the regular law officers of the state. It is moreover an established fact in this case that those officers cannot take the time from their official duties to serve that department's needs. These facts will be presumed to have been known to the legislature when the legislation here under consideration was enacted in 1917 . . . . Under these circumstances, we are constrained to hold that the legislature . . . had in contemplation that the state highway commission might find it necessary to employ special counsel from time to time and intended to confer such power upon that department when it authorized the state highway commission to "appoint and fix the compensation of such . . . other help as may be necessary to the proper conduct of the work of the commission under the provisions of this act." State v. Davidson, supra, 33 N.M. at 666, 670-671.

Accordingly, in view of the circumstances that the statutory duties of the Attorney General and the District Attorney in 1917 were narrower in scope than the needs of the State Highway Commission for legal assistance as well as the fact that the "other manifold duties imposed by law upon those officials" and their limited staffs were such that it would be impossible for them to care for the legal needs of the Highway Department, the Court was compelled by the rules of statutory construction to interpret the statutory authority of the State Highway Commission to include the authority to employ "special counsel" from time to time.

With respect to the third contention advanced on the part of the State in Davidson case to the effect that Section 17-1-12, supra, prohibited the employment of "special counsel" in the absence of an order of a court, Section 17-1-12, supra, then read as follows:

No one shall represent the state or any county thereof in any matter in *{*93}* which he may be interested, except the district attorney his legally appointed and qualified assistants, or the attorney general or his legally appointed and qualified assistants, and such associate counsel as may appear on order of the court with the consent of the district attorney or attorney general, except in cases where the district attorney is absent and has no assistant present to attend to such business, or in cases where the district attorney and his assistant may for some reason be disqualified or refuse to prosecute, in which case the court shall appoint a competent person to represent the county or state, who shall receive the fees herein provided. (Emphasis added.) Laws 1909, Ch. 22, Section 15.

Concerning this statutory language, the Court first noted that a reading of the section showed that a mistake was made by the Legislature in the use of the pronoun "he" instead of "they," To render the section harmonious, the Court inserted the pronoun "they" for "he" and concluded that the Attorney General's Office or the District Attorney's Office must represent the State or a county in any matters in which they might be interested.

The Court then concluded that Section 17-1-12, supra, as it read in 1927 did not preclude the State Highway Commission from employing "special counsel" to render certain legal assistance not involving a court appearance since:

It is perfectly apparent that the statute refers only to proceedings in court. It contemplates that application shall be made to the court in which some case may be pending for the appointment of associate counsel with the consent of the district attorney or attorney general or in case of disqualification of, or refusal to act by, the district attorney, the court may appoint such special counsel. State v. Davidson, supra, 33 N.M. at 674.

The Court's conclusion with respect to the meaning of Section 17-1-12, supra, must likewise be evaluated in the context of the circumstances which prevailed at the time of its original enactment in 1909 and at the time of the employment of "special counsel" by the State Highway Commission in 1927. As previously noted in this regard, during that period neither the Attorney General nor the District Attorney had the capacity to fully satisfy the needs of the State Highway Commission with respect to legal services, and thus the Court was compelled by the rules of statutory construction to interpret Section 17-1-12, supra, in a manner which permitted the department to function effectively at that time.

Following the decision in the Davidson case, however, the Legislature enacted Chapter 21, Laws 1933, which completely changed the circumstances which had directed the Court to its decision. In Chapter 21, Laws 1933, the Legislature repealed the prior statutes pertaining to the Attorney General and created instead a Department of Justice headed by the Attorney General with considerably broadened authority with respect to the legal affairs of the State of New Mexico. Moreover, the Legislature specifically prohibited the employment of ". . . any person for services as an attorney or counselor to any *{*94}* department of the state government . . ." unless such employment were expressly authorized by statute. The Attorney General was authorized to employ additional staff who were required to devote their entire time to the duties of their position. Furthermore, the Legislature repealed the statutory provision which had given the State Highway Commission the express authorization to employ "special counsel." By these changes in the law, the Legislature clearly altered the circumstances which led the Court to its conclusion in the Davidson case and established a statutory framework which would direct a different decision today.

Finally, in Chapter 21, Laws 1933, the Legislature likewise amended Section 17-1-12, supra, to read as it does today. By doing so, the Legislature similarly changed the circumstances which led the court to its conclusion in the Davidson case with respect to the meaning of Section 17-1-12, supra. Indeed, the changes made in that statute by Chapter 21, Laws 1933, relate solely to the provisions discussed by the court in the Davidson case. The Legislature changed the use of the pronoun "he," to read "said state or county." The language of the statute prior to the 1933 amendment, which was phrased in terms of "cases," and which was cited by the court in support of its

interpretation, was deleted. Compare Section 17-1-12 as it now reads, and Section 17-1-12 prior to the 1933 amendment.

One of the recognized rules of statutory construction is to look to the state of the law when the statute was enacted in order to see the reason behind the substituted language. The Legislature, in substituting the language of a later enactment, is presumed to have known not only statutory law, but also such interpretation as may have been given to it by the courts, and it is presumed to have intended to change the original provisions. Bettini v. City of Las Cruces, 82 N.M. 633, 485 P.2d 967 (1971); Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1966); State v. Tapia, State Bar of N.M. Bull., Vol. 15, No. 8 at 1242 (Ct. App. 1976); State v. Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975); State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973).

It seems apparent that the amendment, following soon after the decision in Davidson, supra, was designed for the purpose of changing the situation therein, just as it did with respect to the statutes pertaining to the Attorney General and the State Highway Commission. Cash v. Addington, 46 N.M. 451, 131 P.2d 265 (1942); Rodgers v. Ferguson, State Bar of N.M. Bull., Vol. 15, No. 33 at 1490 (Ct. App. 1976). To interpret Section 17-1-12, supra, and hence, Section 17-1-3.1, supra, as referring only to court proceedings would render the amendments to such statutes useless. It may not be presumed that the legislature intended to enact an idle or useless change in the law. Alvarez v. Board of Trustees of La Union Townsite, 62 N.M. 319, 309 P.2d 989 (1957); Griego v. Health & Social Services Dept., 87 N.M. 462, 535 P.2d 1088 (Ct. App. 1975). Opinion of the Attorney General No. 2088, dated January 5, 1939.

The purpose of Sections 17-1-12, supra, and 17-1-3.1, supra, is to prevent an attorney engaged in the performance of public duties from being influenced *{*95}* or appearing to be influenced, by personal or private interests. See State v. Hill, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975); Lieder v. Chicago Transit Auth., 26 Ill. App. 2d 306, 167 N.E.2d 711 (1960); Marfisi v. 4th Judicial Dist. Ct., 456 P.2d 443 (Nev. S. Ct. 1969); Aldridge v. Capps, 156 P. 624 (S. Ct. Okla. 1916); Commonwealth ex rel. Shumaker v. New York and Pa. Co., 106 A.2d 239 (S. Ct. 1954); Callahan v. Jones, 92 P.2d 328 (S. Ct. Wash. 1939); 81 A.L.R. 2d 770. The potential for conflict between public and private interests exists whether the legal services rendered consist of court appearances or other legal services. The purpose of the legislature, in amending these statutes to minimize the potential for such a conflict or the appearance of such conflict, must be given full force and effect. Trujillo v. Romero, 82 N.M. 301, 481 P.2d 89 (1971); State v. Cutnose, supra.

An additional issue arises as to whether the provisions of Section 15-36A-1, supra, grants a county the implied power to retain private counsel to render advice necessary to implement a county's express powers. See El Dorado at Santa Fe, Inc., supra. Section 17-1-11, NMSA 1953 Comp. (DUTIES OF DISTRICT ATTORNEY), reads in part:

Each district attorney shall: . . .

B. Represent the county before the board of county commissioners . . . in all matters before the board whenever requested to do so by the board . . .

C. Advise all county . . . officers whenever requested . . . (Emphasis added.) Laws 1966, Ch. 28, Section 30.

This statute confers upon District Attorneys the responsibility of responding to county requests for legal advice. The statute does not confer upon counties any discretion to seek such assistance elsewhere. The parameters of county discretion in this regard are set forth in Section 17-1-12, supra, and they are left undisturbed by Section 15-36A-1.

For the foregoing reasons, it is the opinion of this Office that, in the absence of a court order with the consent of the Attorney General or the District Attorney, pursuant to Section 17-1-12, supra, associate private counsel may not render legal services to a county after January 1, 1977.

Question No. 2: An exception to this rule is created for an incorporated Class H county. The New Mexico Constitution, Article X, Section 5, permits a Class H county to become incorporated and thereafter to exercise "all powers granted to municipalities by statute." The Municipal Code, Section 14-1-2(G), NMSA 1953 Comp., includes within its definition of a municipality "incorporated counties and H class counties." That same Municipal Code at Section 14-11-4(B) authorizes municipalities to "provide for the office of an attorney." Therefore, the Constitution and laws of New Mexico create a specific exception for this one class of counties which supercedes the general laws applicable to all other counties described above. This exception would permit an incorporated Class H county to employ counsel other than the *{*96}* Attorney General or the District Attorney. If such counsel also maintains a private law practice, he may not, of course, use county facilities to engage in such private pursuits.

ATTORNEY GENERAL

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