Opinion No. 15-1655

October 21, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Mr. C. C. Royall, Assistant District Attorney, Silver City, New Mexico.

As to compensation for assistant district attorneys for collecting delinquent taxes.

OPINION

*{*225}* I have had on my desk for quite a long time your letter relative to your receiving special compensation for the collection of old delinquent taxes. You say that sometime in May the County Commissioners agreed to give you five per cent of the collections of such taxes, and a retainer for bringing suits which were necessary on other collections, and to pay you for correcting errors on the tax rolls. I sympathize with your feeling that the present district attorneys, elected as officers of the state, the state government having been organized in January, 1912, ought not be to compelled to go back and do work which former district attorneys should have done, and if they did that back work they ought to be entitled to some additional compensation, and I have held your letter so long because I have been trying to convince myself that the law would justify the payment of such compensation. I have been unable to reach that conclusion, and I will, as briefly as possible, state to you my reasons.

The Supreme Court of the state has declared, in Ward v. Romero, 17 N.M., 88, 94, that the constitution makes the district attorney the law officer of the state and of the various counties within his district, and that court is clearly of the opinion that as a state officer he is precluded from receiving for his own use any fees, allowance *{*226}* or emoluments, other than the salary to be provided for him by the legislature. Now, if he should make any collection of delinquent taxes, no matter when those taxes accrued, he would do so as the representative of the state and of the counties. Any suit which he might bring would necessarily be in the name of the state for such taxes. No other officer, unless possibly it might be the attorney general, and no other member of the bar, could have authority to bring any such suits, and he would bring those suits by virtue of his official authority so to do. This is clearly indicated by Section 1860 of the new codification. If he should receive any additional compensation on account of such services I am unable to see how we can avoid holding that that would be directly in opposition to the opinion of the Supreme Court above referred to, and in violation of Section 9 of Article XX of the Constitution.

This brings us to a consideration of the question as to whether an assistant district attorney is in any better or different position than his principal. The statute authorizing the appointment of assistants to district attorneys was enacted in 1905, and re-appears as Section 1858 of the codification. That section provides that the assistant district

attorney may attend meetings of the county commissioners, the district court, justice and probate courts in the district, and therein discharge any duties imposed by law upon, or required of the district attorney by whom he was appointed. In effect this gives him authority to act for his principal substantially the same as that principal might for himself. The next section in the codification, which was originally a part of Chapter 22 of the Laws of 1909, declares what shall be the duties of the district attorney, and the section following that one forbids the representation of the state or any county except by the district attorney or his assistants or the attorney general or his assistants, with certain exceptions which are unimportant to the subject under discussion. The same rule must apply to them as to the district attorneys themselves, but in your particular case there is some room to contend that the constitutional provision and the opinion of the Supreme Court are not applicable. There can be no doubt that under the general pre-existing authority, which is not inconsistent with the constitution and is, therefore, continued in force by Section 4 of Article XXII of the Constitution, any district attorney may appoint an assistant, but I notice that for your district no provision is made for any salary or compensation for an assistant district attorney. In other words, there is no salary for him provided by law. It might be argued that the legislature contemplated that in that district the district attorney should discharge all of the duties of that office, but, as already stated, the general authority that every district attorney may appoint an assistant, still continues. There being no salary for you provided by law, may we not reasonably contend that you and the county commissioners may make arrangements for your compensation without violating the constitutional provision? Can it be said that the legislature has imposed the performance of all such duties upon the district attorney, and that any arrangement by which you should be paid for your services is a violation of the spirit of the legislative enactment, and indirectly does give the district *{*227}* attorney some additional emoluments beyond the salary provided by law?

I must say that I do not feel quite clear about this, although I have no doubt that if you can maintain the idea above suggested it would not be applicable to any other district, in each of which there is a provision by law for the salary of assistants. I believe that you ought to get this before the court and have it distinctly passed upon.