

Opinion No. 45-4710

May 9, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Hilario Rubio Attorney at Law Las Vegas, New Mexico

{*62} I have your letter of recent date wherein you request an official opinion of this office concerning whether or not a member of the Legislature may represent a state department on a fee basis as an attorney.

Section 2-104 of the 1943 Supplement to the 1941 Compilation (Section 1, Chapter 18, Laws of 1943) provides:

"From and after January 1, 1945, 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."

The question is whether or not an attorney retained on a fee basis is an officer or employee of the state, who alone are prohibited from receiving compensation under this law. Under the definition of a state officer found in *State ex rel Gibson v. Fernandez*, 40 N.M. 288, 58 P. 2d, 1197, it is clear that an attorney retained on a fee basis is not a state officer. The remaining question is whether or not such an attorney would be a state employee. An attorney retained on a fee basis by the State would, of course, enter into the relationship of attorney and client. The relationship of attorney and client is created by the **employment** by a client capable of entering into contractual relations of an attorney possessing authority to practice his profession.

See *ex parte Schneider* 294, S. W. 736, 738, and 7 C. J. S., Attorney and Client, Section 65.

In view of the fact that an employment is necessary, the person employed would of necessity be an employee.

It has also been held in the cases of *In re Cooperative Law Company* 198 N. Y. 479, 92 N. E. 15; *Chatham Lumber Co. v. Parsons Lumber Co.* (N.C.) 90 S. E. 241 and *In re Clifton* 155 S. 324, that:

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and involves the highest personal trust and confidence."

In view of the foregoing authorities, it is my opinion that an attorney retained by the State on a fee basis would be an employee of the State, and if such attorney is a member of the state Legislature, he would, therefore, be prohibited from receiving any

compensation as an employee of the State, except such compensation and expense money as he is entitled to as a member of the Legislature.

By HARRY L. BIGBEE,

Asst. Atty. General