

CHAPTER 8 ELECTED OFFICIALS

ARTICLE 1 COMPENSATION

8-1-1. Compensation of elective state officers.

A. Annual compensation of elective state officers shall be paid as follows:

governor	\$90,000
secretary of state	65,000
state auditor	65,000
state treasurer	65,000
attorney general	72,500
commissioner of public lands	72,500
state corporation commissioner	65,000.

B. Any person succeeding to the office of governor as provided in Article 5, Section 7 of the constitution of New Mexico shall receive the salary of the office. Every person serving as acting governor during the incapacity or absence of the governor from the state, other than the secretary of state, shall receive one hundred fifty dollars (\$150) as compensation for each day's service as acting governor.

C. All compensation under this section shall be paid from the general fund, except that the amount paid to the commissioner of

public lands shall be paid from the state land office maintenance fund.

History: 1953 Comp., § 4-5-1, enacted by Laws 1971, ch. 260, § 1; 1975, ch. 305, § 1; 1977, ch. 346, § 2; 1980, ch. 133, § 1; 1981, ch. 286, § 1; 1986, ch. 49, § 1; 1989, ch. 237, § 1.

Cross-references. - For compensation of lieutenant governor, see 8-3-3 NMSA 1978.

As to mileage of legislators, see N.M. Const., art. IV, § 10.

Compiler's note. - Laws 1971, ch. 260, § 1 enacted a new 4-5-1, 1953 Comp., which replaced former 4-5-1, 1953 Comp., (1941 Comp., §§ 3-1501, 10-422, Laws 1945, ch. 62, § 1; 1951, ch. 109, § 1; 1953, ch. 180, § 1), fixing salaries of elective state officers, which was repealed by Laws 1957, ch. 238, § 3.

Right and duty to pay salary. - This section clearly creates a right in the officer to require monthly payment of his statutory compensation, and a duty upon the disbursing officer to honor such demand. 1957-58 Op. Att'y Gen. No. 57-262.

President pro tempore of senate while acting as governor should be paid on a basis of a 365-day annual compensation period. 1957-58 Op. Att'y Gen. No. 58-193.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7 Am. Jur. 2d Attorney General § 4; 38 Am. Jur. 2d Governor § 3; 63A Am. Jur. 2d Public Officers and Employees §§ 431 to 486.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

De factor officer or employee, payment of salary to, as defense to action or proceeding by de jure officer or employee for salary, 64 A.L.R.2d 1375.

81A C.J.S. States §§ 104 to 119.

ARTICLE 2

GOVERNOR-ELECT

8-2-1. Policy of legislature.

It is the policy of the legislature that the transition from the administration of one governor to the administration of another governor be orderly and without friction and confusion. The legislature finds that the lag between the election and the inauguration of a new governor is approximately two months and consequently there is a premium on the necessity of a well-planned period of transition. The legislature further finds that for

an orderly and efficient transfer of executive authority, the resources required by a governor-elect include, as a minimum, temporary office space in close proximity to the governor's office and the department of finance and administration, the equipment and supplies for such an office and the use of a limited full-time staff and clerical employees.

History: 1953 Comp., § 4-28-1, enacted by Laws 1967, ch. 116, § 1.

8-2-2. Governor-elect; office space and equipment.

Whenever the governor-elect is a different individual than the incumbent governor, the legislative council shall upon his certification of election provide suitable office space in the legislative building and furniture and equipment for the temporary use of the governor-elect and his staff until the inauguration.

History: 1953 Comp., § 4-28-2, enacted by Laws 1967, ch. 116, § 2.

8-2-3. Access to budget information.

The secretary of finance and administration shall fully cooperate with the governor-elect and his staff and shall permit the governor-elect to have full access to all reports, hearings, information and data pertaining to the proposed executive budget.

History: 1953 Comp., § 4-28-3, enacted by Laws 1967, ch. 116, § 3; 1977, ch. 247, § 30.

ARTICLE 3 LIEUTENANT GOVERNOR

8-3-1. Lieutenant governor; powers and duties.

The lieutenant governor in addition to his other duties provided by law shall have the following powers and duties:

A. the lieutenant governor shall:

- (1) facilitate and promote the cooperation and understanding between the people of this state and the agencies of state government, by assisting them in their dealings with such agencies, and by assisting the agencies to explain their functions, duties and administrative procedures insofar as they affect the people of this state;
- (2) refer any complaints or special problems of the citizens of this state to the proper agency;
- (3) keep records of his activities and make an annual report to the governor; and

(4) perform any other duties that may from time to time be assigned him by the governor.

History: 1953 Comp., § 4-1-3, enacted by Laws 1971, ch. 138, § 1.

Cross-references. - As to duties of lieutenant governor, see N.M. Const., art. V, § 7.

As to serving on cabinet, see 9-1-3 NMSA 1978.

Compiler's note. - This section, as enacted, did not contain a Subsection "B."

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81A C.J.S. States § 131.

8-3-2. Attorney general; cooperation of agencies.

A. The attorney general shall provide, upon request, legal opinion and advice to the lieutenant governor.

B. All state agencies shall cooperate with the lieutenant governor in the performance of his duties.

History: 1953 Comp., § 4-1-4, enacted by Laws 1971, ch. 138, § 2.

8-3-3. Compensation.

For the performance of the duties established in Section 8-3-1 NMSA 1978, the lieutenant governor shall receive an annual compensation of sixty-five thousand dollars (\$65,000).

History: 1953 Comp., § 4-1-5, enacted by Laws 1971, ch. 138, § 3; 1977, ch. 346, § 1; 1980, ch. 133, § 2; 1981, ch. 286, § 2; 1986, ch. 49, § 2; 1989, ch. 237, § 2.

Cross-references. - As to compensation of other elective state officers, see 8-1-1 NMSA 1978.

For the compensation of the lieutenant governor while presiding officer of the senate, see N.M. Const., art. V, § 12.

ARTICLE 4 SECRETARY OF STATE

8-4-1. Repealed.

ANNOTATIONS

Repeals. - Laws 1978, ch. 132, § 6, repeals 4-2-1, 1953 Comp. (8-4-1 NMSA 1978), relating to payment of bond premium for secretary of state, effective March 6, 1978.

8-4-2. [Chief clerk as assistant; appointment; oath; bond.]

The secretary of state is hereby authorized to appoint his chief clerk to be assistant secretary. Such assistant secretary shall, before entering upon the discharge of his duties give bond to the state in the sum of five thousand dollars (\$5,000), which bond shall be approved by the secretary of state and filed in his office, and shall take and subscribe an oath of office as required by law.

History: Laws 1903, ch. 75, § 1; Code 1915, § 5316; C.S. 1929, § 134-202; 1941 Comp., § 3-102; 1953 Comp., § 4-2-2.

Cross-references. - As to constitutional oath of office, see N.M. Const., art. XX, § 1.

Number of assistants. - This section does not allow the secretary of state to have more than two assistants who are not classified under the Personnel Act. 1966 Op. Att'y Gen. No. 66-109.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Statutory conditions prescribed for public officers' bond as part of bond which does not in terms include them, or which expressly excludes them, 109 A.L.R. 501.

Liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A.L.R. 959.

Public officer's bond as subject to forfeiture for malfeasance in office, 4 A.L.R.2d 1348.

81A C.J.S. States § 127.

8-4-3. [Assistant secretary; powers.]

The assistant secretary shall have power, in the absence of the secretary, to file all instruments required by the laws of New Mexico to be filed in the office of the secretary of state, and to certify to copies thereof, under his hand and the great seal of the state, with the same force and effect as if the same had been filed or certified by the secretary of state.

History: Laws 1903, ch. 75, § 2; Code 1915, § 5317; C.S. 1929, § 134-203; 1941 Comp., § 3-103; 1953 Comp., § 4-2-3.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81A C.J.S. States § 132.

8-4-4. Fees of secretary of state.

The secretary of state shall collect the following fees to be deposited with the state treasurer for credit to the general fund:

photocopies of records, per page	\$.10
.....	
each duplicate microfiche	
.....	.25
each certificate	
.....	1.00
filing or recording an official bond or bank depository bond	
.....	2.00
filing each official oath	
.....	1.00
search of records where another fee is not prescribed, per hour of search	
.....	2.00
duplicate commission of office	
.....	1.00.

History: 1953 Comp., § 4-2-4, enacted by Laws 1969, ch. 272, § 1; 1982, ch. 17, § 1.

Repeals and reenactments. - Laws 1969, ch. 272, § 1, repealed former 4-2-4, 1953 Comp., relating to the secretary taking possession of legislative property after adjournment, and enacted a new 4-2-4, 1953 Comp.

Fees for recording collection agency bonds and continuation certificates. - See 1943-44, Op. Att'y Gen. No. 4511 (rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81A C.J.S. States § 104.

8-4-5. Bureau of elections created; organization; duties.

There is created within the office of the secretary of state a "bureau of elections." The bureau of elections shall be headed by a director who shall be appointed by the secretary of state and who shall be knowledgeable in the election laws of the state. The bureau of elections shall perform those duties pertaining to the state administration of elections as are assigned by the secretary of state and which are pursuant to the election laws of the state. Such duties shall include the conduct of schools, instruction and training pertaining to election administration and the preparation of instruction materials and manuals to promote uniformity of the administration of election laws in the state. There is created in the bureau of elections the position of state voting machine supervisor. The state voting machine supervisor shall be knowledgeable in the mechanical operation, repair and maintenance of voting machines used in this state.

The state voting machine supervisor shall provide assistance to counties in the repair, maintenance, care and proper use of voting machines owned by the counties.

History: 1953 Comp., § 4-2-7, enacted by Laws 1969, ch. 191, § 1.

County voting machine technicians are trained by state voting machine supervisor. 1973 Op. Att'y Gen. No. 73-13.

8-4-6. Distribution of session laws.

A. The secretary of state shall transmit copies of the session laws without charge as follows:

- (1) one copy to each New Mexico supreme court justice;
- (2) one copy to each New Mexico court of appeals judge;
- (3) one copy to each New Mexico district court judge;
- (4) five copies to the New Mexico attorney general;
- (5) two copies to each New Mexico district attorney;
- (6) one copy to the board of county commissioners of each county;
- (7) copies to other state officers and agencies or additional copies to those listed above if the copies or additional copies are needed for governmental purposes and are not to replace lost volumes; and
- (8) copies to the supreme court law library as may be required for exchange of similar materials with officers and agencies of the federal government, other states, districts, territories or possessions of the United States.

B. Copies of session laws supplied to officers and agencies of this state remain the property of the state and shall be delivered to their successors.

C. Whenever it is necessary to replace a volume of the session laws, because of the loss of the original volume, the secretary of state shall charge the officer or agency the same price they would charge if it were sold to a private individual and the money from the sale shall be deposited in the fund it would be deposited in if it resulted from a sale to a private individual.

History: 1953 Comp., § 10-1-13, enacted by Laws 1973, ch. 248, § 1; 1978, ch. 130, § 2; 1978 Comp., § 34-4-1; recompiled as 1978 Comp., § 8-4-6.

Repeals and reenactments. - Laws 1973, ch. 248, § 1, repealed former 10-1-13, 1953 Comp., relating to distribution of supreme court reports, statutes and session laws, and enacted a new 10-1-13, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 73 Am. Jur. 2d Statutes §§ 84 to 87.

77 C.J.S. Reports § 8; 82 C.J.S. Statutes § 63.

ARTICLE 5

ATTORNEY GENERAL

8-5-1. [Creation of department of justice.]

That the department of justice be, and same is hereby created, with the attorney general as head thereof, which shall be located at the seat of government.

History: Laws 1933, ch. 21, § 1; 1941 Comp., § 3-301; 1953 Comp., § 4-3-1.

8-5-2. Duties of attorney general.

Except as otherwise provided by law, the attorney general shall:

- A. prosecute and defend all causes in the supreme court and court of appeals in which the state is a party or interested;
- B. prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor;
- C. prosecute and defend all actions and proceedings brought by or against any state officer or head of a state department, board or commission, or any employee of the state in his official capacity;
- D. give his opinion in writing upon any question of law submitted to him by the legislature or any branch thereof, any state official, elective or appointive, or any district attorney on any subject pending before them or under their control with which they have to deal officially or with reference to their duty in office;
- E. prepare drafts for contracts, bonds and other instruments of writing which may be required for the use of the state whenever requested to do so by any state officer;
- F. promptly account to the state treasurer for all state funds received by him;

G. report to the governor and legislature the condition of his office, the text of all opinions rendered and a summary of business transacted of public interest, which report shall be submitted each year;

H. keep a register of all opinions rendered and all actions prosecuted and defended by him, and of all proceedings in relation thereto;

I. attend and assist in the trial of any indictment or information in any county on direction of the governor;

J. appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action or when requested to do so by the governor; and

K. perform all other duties required by law.

History: Laws 1933, ch. 21, § 2; 1941 Comp., § 3-302; 1953 Comp., § 4-3-2; Laws 1966, ch. 28, § 15; 1975, ch. 327, § 1.

I. General Consideration.

II. Supreme Court and Court of Appeals.

III. Other Courts.

IV. State Officers and Employees.

V. Opinions.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross-references. - For the duty of the attorney general to give advice to the lieutenant governor, see 8-3-2 NMSA 1978.

As to the publication and sale of the opinions and reports of the attorney general, see 8-5-6, 8-5-7 NMSA 1978.

As to publication and sale of an index to the opinions, see 8-5-14 NMSA 1978.

As to the duty to represent any officer, deputy, assistant, agent or employee of the state or a state institution, see 8-5-15 NMSA 1978.

For the term of office of the attorney general, see N.M. Const., art. V, § 1.

As to the attorney general being a member of the executive department, see N.M. Const., art. V, § 1.

As to the attorney general residing and keeping books, papers, public records and seal of office at the seat of government, see N.M. Const., art. V, § 1.

As to the qualifications for the office of attorney general, see N.M. Const., art. V, § 3.

For the attorney general's salary, see N.M. Const., art. V, § 12, and 8-1-1 NMSA 1978.

As to counsel for multistate tax commission member, see 7-5-5 NMSA 1978.

As to being legal adviser to taxation and revenue department, see 9-11-11 NMSA 1978.

As to representation of the state or any county by the attorney general, see 36-1-19 NMSA 1978.

Historical. - In the Act of 1859, the duties of the attorney general were coextensive with the territory; but by the Act of 1862, his duties were expressly limited to the supreme court and district courts of the first and second districts. In the Act of January 28, 1863, § 25, the territorial limits within which the attorney general was to exercise his duties was again reduced and restricted to the first judicial district. Territory ex rel. Wade v. Ashenfelter, 4 N.M. (Gild.) 93, 12 P. 879 (1887), appeal dismissed, 154 U.S. 493, 14 S. Ct. 1141, 38 L. Ed. 1079 (1893).

Attorney general has no common-law powers or duties; his duties are statutory. State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 85 N.M. 521, 514 P.2d 40 (1973).

The office of attorney general in New Mexico was created by statute, and its powers and duties defined and limited by statute from its inception. No common-law powers were confirmed in the office of attorney general by the constitution of New Mexico. State v. Davidson, 33 N.M. 664, 275 P. 373 (1929).

Attorney general's prosecution of state officer he formerly represented. - The appointment of the New Mexico attorney general, and a deputy attorney general, to act as special assistant United States attorneys for prosecution of criminal charges against the state investment officer and an assistant state treasurer alleging a conspiracy to extort a political contribution involved no inherent or actual conflict of interest under the rules of professional responsibility or this section. An inherent conflict of interest does not arise merely because a state attorney general prosecutes a state officer whom he formerly represented. United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7 Am. Jur. 2d Attorney General §§ 9 to 13.

Right of attorney general to intervene in divorce suit, 22 A.L.R. 1112.

Dismissal of criminal proceedings on motion to attorney general, 66 A.L.R. 1378.

Power of attorney general to compromise, settle or dismiss suit or proceeding, 81 A.L.R. 124.

Quo warranto, concurrent or conflicting powers of prosecuting attorney and attorney general as to bringing action of, 131 A.L.R. 1212.

Right of attorney general to represent or serve administrative officer or body to exclusion of attorney employed by such officer or body, 137 A.L.R. 818.

Will contest: right of attorney general to intervene in will contest case involving charitable trust, 74 A.L.R.2d 1066.

Duty of trustees of charitable trust to furnish information and records to attorney general relating to trust administration, 86 A.L.R.2d 1375.

Consumer protection: right of public official to seek restitution of fruits of consumer fraud, without specific statutory authorization, 55 A.L.R.3d 198.

7A C.J.S. Attorney General § 7.

II. SUPREME COURT AND COURT OF APPEALS.

Attorney general must represent state in any appeal. State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301 (1970).

Appeal of criminal cases. - District attorney has authority to take an appeal, but it is the prerogative and duty of the attorney general to brief the case and to present it in the supreme court, and a district attorney may appear on appeal in a criminal case only by permission of the attorney general and in association with him. State v. Aragon, 55 N.M. 421, 234 P.2d 356 (1950).

Filing of brief by special assistant attorney general. - Where brief erroneously filed by district attorney was ordered stricken and attorney general and regular assistants disqualified, the special assistant attorney general was allowed 20 days in which to file a brief on the merits. State v. Aragon, 55 N.M. 421, 234 P.2d 356 (1950).

III. OTHER COURTS.

Duty to prosecute. - Attorney general is charged by statute with the duty of prosecuting in court any action when in his judgment the interest of the state requires such action. State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301 (1970).

Inherent in the attorney general's duty to "prosecute" is the power to initiate civil lawsuits when, in his judgment, the interest of the state is in need of protection. State ex rel. Bingaman v. Valley Sav. & Loan Ass'n, 97 N.M. 8, 636 P.2d 279 (1981).

The language of this section grants the attorney general discretion in determining when the public interest requires him to bring a civil action on behalf of the state. *State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 97 N.M. 8, 636 P.2d 279 (1981).

This section and 8-5-3 NMSA 1978 permit the attorney general to bring an action on behalf of the state if no other provision has been made for it to be brought, or to step into litigation brought by another where the interests of the state are not being adequately represented or protected. *State v. Koehler*, 96 N.M. 293, 629 P.2d 1222 (1981).

When district attorney's office disqualified. - Where an attorney has represented the defendant in his first trial and later becomes a member of the district attorney's staff, the district attorney's office must divorce itself from the prosecution of the second trial. The prosecution can then be performed by the attorney general or his assistants and such associate counsel as may appear on order of the court with the consent of the attorney general. *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

No right to displace generally. - Nothing in this section suggests a right in the attorney general to displace the district attorney in a case where the rights of the state are being actively advocated. *State ex rel. Attorney Gen. v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967).

There is nothing in the laws making the attorney general the superior of the district attorneys. *State ex rel. Attorney Gen. v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967).

Powers given are concurrent. - The most that can be said concerning the powers of the attorney general in this section is that it gives concurrent right with the district attorney to bring an action, and there is nothing in this section which remotely suggests a right to supplant or take over from a district attorney who is performing his legal duties. *State ex rel. Attorney Gen. v. Reese*, 78 N.M. 241, 430 P.2d 399 (1967).

Real party in interest. - The attorney general's duty of prosecuting any action when, in his judgment, the interest of the state is present, makes him a real party in interest. *State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 97 N.M. 8, 636 P.2d 279 (1981).

Right to maintain suit in water-law cases. - The attorney general may maintain suit on behalf of state to enjoin use of unappropriated water for irrigation contrary to law. *State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950), appeal dismissed, 341 U.S. 924, 71 S. Ct. 798, 95 L. Ed. 1356 (1951).

IV. STATE OFFICERS AND EMPLOYEES.

Attorney general is legal representative of state agencies, departments, etc. - While a district attorney is to advise state officers within his district when requested, this means "advise these officers on matters relating to the judicial district in which he is

located." This position is made firm when we remember that the attorney general is the legal representative of all state agencies, departments, etc. 1961-62 Op. Att'y Gen. No. 61-61.

And of magistrates. - As a magistrate is a state officer, he is entitled to be represented by the attorney general's office when he is sued as a result of action taken by him in his official capacity. 1971 Op. Att'y Gen. No. 71-83.

Representation of state corporation commission and customers. - The attorney general's representation both of the state corporation commission and of unrepresented customers of a utility is proper. His representation of other parties before the commission is not a conflict of interest and not a violation of his constitutional duty to represent the commission. *Mountain States Tel. & Tel. Co. v. Corporation Comm'n*, 99 N.M. 1, 653 P.2d 501 (1982).

V. OPINIONS.

Formal and informal. - The attorney general is authorized to render formal and official opinions only to those officials stated in this section. However, an informal and unofficial expression of view may be given to nonenumerated officials. 1970 Op. Att'y Gen. No. 70-59.

Opinion on qualification of legislator unauthorized. - This section and N.M. Const., art. III, § 1 (separation of powers provision) bar the attorney general from giving an opinion of the issue of whether or not a public school teacher is prohibited from becoming a state legislator. Only the legislature itself can decide the qualifications of its members. 1975 Op. Att'y Gen. No. 75-21.

Weight given by supreme court. - The supreme court is not bound by attorney general opinions, and gives them such weight only as it deems they merit and no more. If the court thinks the opinions are right, it follows and approves, and if convinced they are wrong the court rejects them. *City of Santa Rosa v. Jaramillo*, 85 N.M. 747, 517 P.2d 69 (1973); *First Thrift & Loan Ass'n v. State ex rel. Robinson*, 62 N.M. 61, 304 P.2d 582 (1956); *Perea v. Board of Torrance County Comm'rs*, 77 N.M. 543, 425 P.2d 308 (1967).

Opinions of the attorney general are entitled to great weight, however, to the extent they conflict with the conclusions announced by the supreme court, they must be overruled. *Hanagan v. Board of County Comm'rs*, 64 N.M. 103, 325 P.2d 282 (1958).

Conflict over interpretation subject to declaratory judgment. - Where there was an administrative stalemate, detrimental to public interest, in which attorney general claimed that entire chapter on liquor sales was unconstitutional, contrary to assertion of director of department of alcoholic beverage control, and attorney general construed a separate chapter on liquor sales to allow sale of alcoholic beverages by the drink on Sundays, but director denied such an interpretation, there existed an actual controversy

between interested parties rendering suit proper for declaratory judgment relief even though a licensed dispenser of alcoholic beverages was not a party. State ex rel. Maloney v. Sierra, 82 N.M. 125, 477 P.2d 301 (1970).

8-5-2.1. Attorney general; legal service fees for state agencies.

The attorney general may charge state agencies, as defined herein, for the provision of legal services in noncriminal cases requested by the agencies according to a fee schedule approved by the department of finance and administration. For the purpose of this section "state agency" means any department, institution, board, bureau, commission, district or committee of government of the state of New Mexico and every office or officer thereof.

History: Laws 1980, ch. 2, § 1.

Cross-references. - As to representation of state officer by attorney general, see 8-5-15 NMSA 1978.

8-5-3. [Action in civil and criminal cases.]

That upon the failure or refusal of any district attorney to act in any criminal or civil case or matter in which the county, state or any department thereof is a party or has an interest, the attorney general be, and he is hereby, authorized to act on behalf of said county, state or any department thereof, if after a thorough investigation, such action is ascertained to be advisable by the attorney general. Provided, that the attorney general shall, upon direction of the governor, investigate any matter or matters in any county of the state in which the county, state or any department may be interested. After such investigation, the attorney general be, and he is hereby authorized to take such action as, in his opinion, conditions warrant. The cost of such investigation shall be paid out of the general fund of the county wherein such investigation shall have been made, and the costs of any prosecution arising out of such investigation shall be paid as are the costs in cases prosecuted by district attorneys.

History: Laws 1933, ch. 21, § 3; 1941 Comp., § 3-303; 1953 Comp., § 4-3-3.

No right to displace generally. - There is nothing in the laws making the attorney general the superior of the district attorneys. Otherwise, the provision granting the attorney general a right to displace a district attorney only "upon the failure or refusal of any district attorney to act" would be clearly surplusage and unnecessary. State ex rel. Attorney Gen. v. Reese, 78 N.M. 241, 430 P.2d 399 (1967).

Powers when district attorney delegates prosecution. - This section and 8-5-2 NMSA 1978 permit the attorney general to bring an action on behalf of the state if no other provision has been made for it to be brought, or to step into litigation brought by another where the interests of the state are not being adequately represented or protected. Where a district attorney delegates a prosecution to the attorney general, the

attorney general may proceed under the authority of this section. State v. Koehler, 96 N.M. 293, 629 P.2d 1222 (1981).

When district attorney's office disqualified. - Where an attorney has represented the defendant in his first trial and later becomes a member of the district attorney's staff, the district attorney's office must divorce itself from the prosecution of the second trial. The prosecution can then be performed by the attorney general, or his assistants. State v. Chambers, 86 N.M. 383, 524 P.2d 999 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of attorney general to intervene in divorce suit, 22 A.L.R. 1112.

7A C.J.S. Attorney General §§ 11, 12, 13.

8-5-4. [Employment of legal assistance for departments.]

No compensation shall be allowed to any person for services as an attorney or counselor to any department of the state government, or the head thereof, or to any state board or commission, except in cases specially authorized by law, but special legal assistance, may be employed by the attorney general, under his direction and control, at a reasonable compensation, in any pending action or proceeding to protect the interest of the state, with the consent and approval of the governor upon showing made by the attorney general that his department cannot for reasons stated perform such services. The costs of such special legal assistance shall be paid by the department out of which such suit or proceeding originated.

History: Laws 1933, ch. 21, § 4; 1941 Comp., § 3-304; 1953 Comp., § 4-3-4.

Cross-references. - As to counsel for taxation and revenue department, see 9-11-11 NMSA 1978.

Meaning of "to any department of the state government". - Although legislature may have meant by the phrase "to any department of the state government" to mean "to any executive department of the state government," it did not do so in 8-5-4 NMSA 1978, and a strict construction would have to include the legislature. 1951-52 Op. Att'y Gen. No. 53-30.

Employment of counsel by state highway commission. - Under 67-3-12 and 67-3-14 NMSA 1978, the state highway commission has power to employ special counsel to advise and assist it in the performance of its duties. State v. Davidson, 33 N.M. 664, 275 P. 373 (1929).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7A C.J.S. Attorney General § 4.

8-5-5. Assistant attorneys general; other employees; appointment.

A. The attorney general may appoint a deputy attorney general and as many other assistant attorneys general together with stenographic, clerical and other necessary employees on a full- or part-time basis, at salaries to be fixed by him within budget allowances and appropriation limits, as the business of the department shall require and who shall hold office at the pleasure of the attorney general. The deputy attorney general and the assistant attorneys general shall, subject to the direction of the attorney general, have the same power and authority as the attorney general.

B. Within legislative appropriations, the attorney general may appoint full-time salaried members of his staff as peace officers for the full-time investigation of violations of, and, and the full-time enforcement of, the criminal laws of the state. These employees shall comply with the certification provisions of Section 29-7-8 NMSA 1978.

History: Laws 1933, ch. 21, § 5; 1941 Comp., § 3-305; 1953 Comp., § 4-3-5; Laws 1955, ch. 119, § 1; 1965, ch. 214, § 1; 1979, ch. 356, § 1; 1988, ch. 92, § 1.

Cross-references. - As to the special assistant attorney general representing oil conservation commission, see 70-2-35 NMSA 1978.

Duty to appoint assistant attorneys general as special prosecutors. - If a district attorney does not perform properly and adequately his legal duties of investigation and prosecution of civil and criminal cases, and particularly where the district attorney and the attorney general recused their respective offices from participation because of a possible conflict, then the attorney general not only has the power, but it is his duty, where conditions warrant, to perform these functions and to appoint assistant attorneys general as special prosecutors for the appropriate purposes. *State v. Naranjo*, 94 N.M. 407, 611 P.2d 1101 (1980).

Formal swearing-in ceremony not required. - Assistant attorneys general appointed pursuant to this section are not required to undergo the same formal swearing-in ceremony as the attorney general or other public official. *State v. Koehler*, 96 N.M. 293, 629 P.2d 1222 (1981).

Assistant attorney general's salary set by attorney general. - As assistant attorney general is a state officer not subject to the salary classification of the Personnel Act. Further, the legislature has delegated to the attorney general of the state of New Mexico the exclusive right to set the salaries of his assistants. Such power is subject only to the budget allowances and appropriation limits. Thus, it is apparent if the attorney general has the funds available for the payment of his assistants, he may pay them individually such salaries as in his opinion shall be warranted. 1957-58. Op. Att'y Gen. No. 58-29.

This section clearly indicates that the attorney general of New Mexico shall fix the salaries of his assistants subject only to budget allowances and appropriation limits. 1957-58 Op. Att'y Gen. No. 58-29.

When assistant attorneys general may displace district attorneys. - Where an attorney has represented the defendant in his first trial and later becomes a member of the district attorney's staff, the district attorney's office must divorce itself from the prosecution of the second trial, and the prosecution may then be conducted by the attorney general or his assistants. *State v. Chambers*, 86 N.M. 383, 524 P.2d 999 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7A C.J.S. Attorney General § 4.

8-5-6. Opinions and report; sale.

The New Mexico compilation commission shall receive all opinions of the attorney general and shall publish and sell bound annual volumes to officers and agencies of the state and other individuals and entities at a price fixed by the compilation commission. The price fixed by the compilation commission shall not be less than the replacement cost of the volume of opinions plus a markup of not less than twenty-five percent nor more than fifty percent of the replacement cost. Copies of individual opinions may be sold by the compilation commission. All revenue collected from the sale of attorney general opinions shall be credited to the New Mexico compilation fund.

History: 1978 Comp., § 8-5-6, enacted by Laws 1979, ch. 106, § 1; 1982, ch. 7, § 1.

Cross-references. - As to general powers and duties of compilation commission, see 12-1-3 NMSA 1978.

Repeals and reenactments. - Laws 1979, ch. 106, § 1, repealed former 8-5-6 NMSA 1978, relating to sale of opinions and reports of the attorney general by the compilation commission, and enacted a new 8-5-6 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7A C.J.S. Attorney General § 9.

8-5-7. Proceeds of sale; credit to New Mexico compilation fund.

The New Mexico compilation commission shall remit the proceeds of sale of publications of the office of the attorney general to the state treasurer, who shall credit the same to the New Mexico compilation fund, no part of which shall revert at the end of any fiscal year.

History: 1953 Comp., § 4-3-8, enacted by Laws 1959, ch. 20, § 2; 1979, ch. 106, § 2.

8-5-8 to 8-5-13. Repealed.

ANNOTATIONS

Repeals. - Laws 1979, ch. 106, § 6, repeals 8-5-8 to 8-5-13 NMSA 1978, relating to sale of opinions and reports of the attorney general, indexing of the opinions and disposition of proceeds.

8-5-14. Cumulative supplemental index; publication; distribution.

The New Mexico compilation commission shall prepare and publish a cumulative supplemental index for the opinions rendered by the office of the attorney general which shall be sold in the same manner as the opinions.

History: 1953 Comp., § 4-3-15, enacted by Laws 1959, ch. 21, § 7; 1979, ch. 106, § 3.

8-5-15. [Representation of officer, deputy, assistant, agent or employee of state or state institution.]

The attorney general of New Mexico is directed to act, if requested, as attorney for any officer, deputy, assistant, agent or employee of the state or of a state institution in the event such person is named as a party in any civil action in connection with an act growing out of the performance of his duty; provided, however, this section shall not apply to any suits or proceedings on behalf of the state against such person.

History: 1953 Comp., § 4-3-16, enacted by Laws 1959, ch. 45, § 1.

Attorney general to use all means available to defend state employee. - If a defendant, a state employee, has requested representation by the attorney general under this section, the attorney general is under a duty to defend him and is at liberty to use all means available to him in that defense. This representation can be in addition to any representation by the attorneys for an insurance company covering traffic accidents wherein a state employee is involved. 1961-62 Op. Att'y Gen. No. 62-42.

But not county official such as sheriff. - A sheriff is a county official, as distinguished from a state official or employee, and therefore the attorney general's office is not under an obligation to represent a sheriff in a civil action arising from his official conduct in office. 1959-60 Op. Att'y Gen. No. 59-98.

Attorney general not allowed to supplant district attorney. - Where, in a suit by a district attorney, in the name of the state, seeking the recovery of funds paid a state officer, the attorney general seeks to represent the state in lieu of the district attorney and his pleading closely parallels the answer filed by the defendant state officer and the effect of the pleading would be to leave the case uncontested on the side of the state, the proper situation for the application of this section is presented, and the attorney general will not be allowed to supplant the district attorney. State ex rel. Attorney Gen. v. Reese, 78 N.M. 241, 430 P.2d 399 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7A C.J.S. Attorney General § 15.

ARTICLE 6

STATE AUDITOR, TREASURER AND SECRETARY OF FINANCE AND ADMINISTRATION

8-6-1. [Treasurer and auditor; offices; bonds.]

The state treasurer and the state auditor shall keep their offices at the seat of government of the state. They shall, before entering upon the discharge of their duties, respectively, execute, and deliver to the secretary of state a bond to the state in the sum of three hundred thousand dollars [(\$300,000)] for the treasurer, and twenty-five thousand dollars [(\$25,000)] for the auditor, with good and sufficient sureties to be approved by the governor and conditioned for the faithful discharge of the duties required or which may be required of them by law. The approval of the governor and the date thereof shall be endorsed on the bond.

History: Laws 1851-1852, p. 169; C.L. 1865, ch. 102, § 10; C.L. 1884, § 1771; Laws 1891, ch. 27, § 1; C.L. 1897, § 2608; Laws 1905, ch. 69, § 1; Code 1915, § 5327; C.S. 1929, § 134-406; 1941 Comp., § 3-201; 1953 Comp., § 4-4-1.

Cross-references. - As to terms of office, see N.M. Const., art. V, § 1.

As to members of the executive department generally, see N.M. Const., art. V, § 1.

For the qualifications for office, see N.M. Const., art. V, § 3.

As to salaries of state officers, see N.M. Const., art. V, § 12 and 8-1-1 NMSA 1978.

For the amount of bond of state treasurer, see 6-10-38 NMSA 1978.

As to payment of accounts audited by board of trustees of supreme court law library, see 18-1-6 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 72 Am. Jur. 2d States, Territories, and Dependencies §§ 64, 65, 77.

Statutory conditions prescribed for public officer's bond which does not in terms include them, or which expressly excludes them, 109 A.L.R. 501.

Liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A.L.R. 959.

Public officer's bond as subject to forfeiture for malfeasance in office, 4 A.L.R.2d 1348.

81A C.J.S. States § 127.

8-6-2. Seal of state treasurer.

There is adopted an official seal of the treasurer of the state of New Mexico.

The seal shall be in substantially the following form:

REFER TO THE BOOK FOR THE PROPER FORM

The seal shall contain the words "Treasurer of the State of New Mexico" running clockwise around the upper portion of the outer edge, and the date "1912" on the lower part of the outer edge, running from left to right; and there shall be in the center a Mexican eagle grasping a serpent in its beak, the cactus in its talons, shielded by the American eagle with outspread wings, and grasping arrows in its talons; and a key under the eagles. When the state treasurer shall hereafter be required to seal any documents or instruments, he shall use the official seal as adopted by this section.

History: 1953 Comp., § 4-4-2, enacted by Laws 1967, ch. 103, § 1.

Cross-references. - As to the seal being kept at the seat of government, see N.M. Const., art. V, § 1.

Compiler's note. - Laws 1967, ch. 103, § 1, enacted a new 4-4-2, 1953 Comp., which replaced former 4-4-2, 1953 Comp., (Laws 1851-1852, p. 169; C.L. 1865, ch. 102, § 11; C.L. 1884, § 1761; C.L. 1897, § 2591; Code 1915, § 5333; C.S. 1929, § 134-601; 1941 Comp., § 3-202), prescribing duties of auditor, which was repealed by Laws 1957, ch. 252, § 16.

8-6-3. Duties of treasurer; receipts.

The state treasurer shall receive and keep all moneys of the state, except when otherwise specially provided; disburse the public money upon warrants drawn according to law and not otherwise; keep a just, true and comprehensive account of all moneys received and disbursed; render his accounts to the division of financial control of the department of finance and administration annually, or oftener if required; and report to the legislature at the commencement of each regular session, a detailed statement of the condition of the treasury. He shall grant duplicate receipts for all sums of money which shall be paid into the treasury and the person receiving the same shall deposit one with the division of financial control who shall credit such person accordingly and charge the treasurer.

History: Laws 1851-1852, p. 170; C.L. 1865, ch. 102, § 14; C.L. 1884, § 1769; C.L. 1897, § 2602; Code 1915, § 5322; C.S. 1929, § 134-401; 1941 Comp., § 3-204; 1953 Comp., § 4-4-4; Laws 1957, ch. 252, § 12.

Cross-references. - As to public records, books and papers being kept at seat of government, see N.M. Const., art. V, § 1.

As to the investment of special road fund balances, see 6-10-12, 6-10-13 NMSA 1978.

As to the appointment of a deputy treasurer, see 6-10-38 NMSA 1978.

For the penalty for receiving consideration for placing deposit, see 6-10-40 NMSA 1978.

As to signing checks for state funds, see 6-10-58 NMSA 1978.

For the application of federal forest reserve funds, see 6-11-2 NMSA 1978.

As to the penalty for misapplication of federal forest reserve funds, see 6-11-4 NMSA 1978.

For authorization to borrow to pay interest on bonds, see 6-12-1, 6-12-2 NMSA 1978.

For the authority to purchase bonds authorized by fifteenth legislature, see 6-12-3 NMSA 1978.

For refunding bonds generally, see 6-12-6 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 72 Am. Jur. 2d States, Territories, and Dependencies §§ 64, 77.

81A C.J.S. States § 135.

8-6-4. Disbursement of funds; warrant from secretary; interest.

It shall be unlawful for the state treasurer to disburse or pay out any funds in his hands, the proceeds of any regular or special tax or any moneys that may come to his hands as treasurer of the state of New Mexico, except on warrant of the secretary of finance and administration; provided, that in the case of the payments of maturing interest coupons on the bonded debt of the state and in the case of the payment of retiring bonds of this state - either at the maturing of the optional period of the maturity thereof, wherein the law authorizing the issue of such bonds and coupons specifically designates a place of payment other than the office of the state treasurer - the said treasurer may remit such moneys as are necessary, to the places of payment so designated, to take up and pay such state obligations; and immediately upon receipt of such coupons and bonds so paid, he shall present same to the secretary properly cancelled and itemized, and when so presented to the secretary it shall be the duty of that official to issue his warrant chargeable against the proper funds, for the payment so made; provided further, that this article shall not affect or apply to cash appropriations made by the United States government to state institutions, over which the state has no

jurisdiction as to expenditure and wherein such appropriations are remitted to the state treasurer, and by him immediately transferred to the treasurers of such institutions.

History: Laws 1909, ch. 40, § 1; Code 1915, § 5329; C.S. 1929, § 134-408; 1941 Comp., § 3-210; 1953 Comp., § 4-4-9; Laws 1957, ch. 252, § 13; 1977, ch. 247, § 14.

Cross-references. - As to payments and disbursement of public funds, see 6-10-46 NMSA 1978.

Generally. - Comp. Laws 1897, § 2597 was a general limitation upon the authority of the auditor, under which he could audit only such accounts as had been expressly allowed by acts passed, and he was required to report claims not so allowed to the next legislative assembly for its action thereon. *Garcia v. Territory ex. rel. Bursum*, 10 N.M. 43, 61 P. 207 (1900).

When Laws 1957, chs. 248 and 252, were construed by the rule of "pari materia" the supreme court found the duties of the auditor substantially the same as previously performed by him, except preaudit duties and the duty of issuing warrants, which duties had been transferred to the director of the department of finance and administration (now secretary of finance and administration) by the 1957 act. *Torres v. Grant*, 63 N.M. 106, 314 P.2d 712 (1957).

Constitutionality. - Laws 1957, ch. 252, providing warrants on state funds may be drawn only by director of department of finance and administration (now secretary of finance and administration), was not unconstitutional on theory that it removed from the state auditor, a constitutional officer, substantially all the powers and duties of that office. *Torres v. Grant*, 63 N.M. 106, 314 P.2d 712 (1957).

Effect of approval of warrant. - The warrant of the superintendent of insurance on the insurance fund, approved by the auditor (now secretary of finance and administration), was not the warrant of the auditor (now secretary). *State ex rel. Chavez v. Sargent*, 18 N.M. 627, 139 P. 144 (1914).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81A C.J.S. States § 226.

8-6-5. Repealed.

ANNOTATIONS

Repeals. - Laws 1983, ch. 265, § 62, repeals 8-6-5 NMSA 1978, relating to registration of bonds and debentures by treasurer, effective April 7, 1983.

8-6-6. [Malfeasance and neglect of duty by auditor or treasurer.]

If the auditor or treasurer shall willfully neglect or refuse to perform any duty enjoined by law, or shall be guilty of any oppression or extortion in the performance of any legal

duty, or shall receive any fee or reward for the performance of any legal duty not allowed by law, or by color of his office shall knowingly do any act not authorized by law, or in any other manner than is required by law, he shall, upon conviction upon indictment, be adjudged guilty of a misdemeanor in office and be fined any sum not exceeding one thousand dollars [(\$1,000)]. The state or any person injured, in the name of the state, may sue, either before or after an indictment found, upon the bonds of the auditor and treasurer, for any damages suffered by reason of any of the acts of the auditor or treasurer in this section mentioned.

History: Laws 1851, p. 170; C.L. 1865, ch. 102, § 15; C.L. 1884, § 1772; C.L. 1897, § 2609; Code 1915, § 5341; C.S. 1929, § 134-609; 1941 Comp., § 3-222; 1953 Comp., § 4-4-21.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Public officer's bond as subject to forfeiture for malfeasance in office, 4 A.L.R.2d 1348.

81A C.J.S. States §§ 127 to 129.

8-6-7. Wrongful drawing or payment of warrant by secretary or treasurer; penalty.

A. If the secretary of finance and administration draws any warrant on the state treasurer when he knows or with the use of available accounting information should reasonably know there is an insufficient unexpended and unencumbered balance available for the purpose for which the warrant is drawn, he shall be in violation of this section.

B. If the state treasurer pays any warrant when he knows or, with the use of available accounting information, should reasonably know there are insufficient funds available in the treasury for the purpose to pay the warrant, he shall be in violation of this section.

C. A violation of this section shall be punishable by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than one year, or by both such fine and imprisonment in the discretion of the judge.

History: 1978 Comp., § 8-6-7, enacted by Laws 1987, ch. 183, § 1.

Repeals and reenactments. - Laws 1987, ch. 183, § 1 repeals former 8-6-7 NMSA 1978, as amended by Laws 1977, ch. 247, § 15, and enacts the above section, effective June 19, 1987. For provisions of the former section, see the 1983 replacement pamphlet.

Generally. - If the auditor of the territory (now secretary of finance and administration) drew any warrant on the treasurer of the territory when there was no money in the treasury in the particular fund for which such warrant was drawn, he was liable to fine of not less than \$1,000 and imprisonment for not less than one year and summary removal

from office by the governor. *Garcia v. Territory ex rel. Bursum*, 10 N.M. 43, 61 P. 207 (1900).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81A C.J.S. States § 129.