

**Opinion No. 53-5669**

February 11, 1953

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Honorable Paul Tackett District Attorney Second Judicial District Albuquerque, New Mexico

{\*61} This is in reply to your request for an opinion as to whether, as District Attorney of the Second Judicial District, State of New Mexico, you have the authority to require that all complaints filed by any state or county officers in your district, filed in Justice of the Peace or District Courts, be presented to you as District Attorney, to determine charges to be filed, and whether you should appear to represent the county or state before the court where said charges have been filed.

You state that you have had several complaints from persons, especially out of state tourists going through your district, to the effect that they have been arrested by county and state officers and made to plead guilty before some justice of the peace, and whether they were guilty or not they were given the alternative to either plead guilty or to put up an excessive cash bond.

Art 6, § 24, New Mexico Constitution, makes you the chief law officer of the state and the counties within your district.

Sec. 17-113 N.M.S.A., 1941 Compilation reads as follows:

"The district attorney may appear and represent the county or the state in any manner (matter) arising before the courts of justices of the peace or committing magistrates when in his opinion the interests of the people demand his services."

Sec. 17-112 N.M.S.A., 1941 Compilation reads as follows:

"No one shall represent the state or any county thereof in any matter in which said state or county is interested 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."

{\*62} Sec. 40-101 N.M.S.A., 1941 Compilation provides, in part, as follows:

". . . and it is also declared his (every sheriff, deputy sheriff, constable and every other peace officer) duty to cooperate with and assist the attorney-general, district attorney, or other prosecutor, if any, in all reasonable ways. Failure to perform his duty in any material way shall subject such officer so failing, to removal from office and payment of all costs of prosecution."

It is apparent, therefore, in view of the above constitutional provision and the statutes of the state, that you, as chief law enforcement officer, have the authority to appear in any case filed before any justice of the peace in any county in your district when, in your opinion, the interests of the people in your district require your participation in any case filed before a justice of the peace in said district. You may prescribe regulations requiring peace officers to notify your office, where practicable, of all criminal complaints which are to be filed. I realize that sometimes in cases of emergency a State Policeman or a Sheriff, or some other peace officer, may have to file a case before a justice of the peace before consulting your office, but it is the opinion of this office that you have the authority to require said peace officer to notify you as soon as possible of said complaint and that you then have the authority to go to any of the said justices of the peace where said complaint has been filed and to take immediate command of the prosecution of said case.

In the event a peace officer refuses to cooperate with your office he is subject to prosecution for removal from office and subject to the costs of that prosecution. The choice of whether or not he should be prosecuted for such removal is an entirely discretionary matter with the prosecuting attorney, as the prosecuting attorney is the person who desires the cooperation from such law enforcement officers.

It is the further opinion of this office that you have the authority to request the dismissal of an action and if the justice of the peace refuses to dismiss it, but insists upon prosecuting cases which, in your opinion, are illegal, it would be your duty to bring an ouster proceeding against said justice of the peace and to have him removed from office for misfeasance in office. I feel it is as much your duty to protect the public from illegal prosecutions as it is to prosecute offenses where it is necessary.

I trust that this will answer your inquiry, and if we may be of further assistance please call upon us.