

Opinion No. 58-237

December 19, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: Mr. George T. Reynolds, District Attorney, Eighth Judicial District, County Court
House, Taos, New Mexico

QUESTION

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May the duly elected Probate Judge for Colfax County be appointed as Assistant District Attorney with limited authority only?

CONCLUSION

Yes.

OPINION

ANALYSIS

The primary legal question raised in the query above is whether there would be any basic incompatibility between the office of probate judge and the office of district attorney if the duly elected probate judge is appointed as an assistant district attorney inasmuch as we have no law specifically prohibiting the holding of the two offices. The question of "incompatibility between offices" has been raised by opinion requests on numerous occasions. In each instance, we have relied upon the definition of "incompatibility between offices" as was laid down by the New Mexico Supreme Court in *Haymaker v. State*, 22 N.M. 400. In this case the term was described in the first syllabus as being:

"1. Incompatibility between offices is an inconsistency between the functions thereof, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both. Held that office of member of city board of education and clerk thereof are incompatible."

Thus, we must determine as a matter of fact as to whether the aforementioned jobs are incompatible.

The District Attorney, under Article VI, Section 24 of the New Mexico Constitution, is designated as the law officer of the state and county in which he represents. He is a

judicial state officer and his duties under the Constitution are broadly defined. See *State v. Collins*, 28 N.M. 230. An Assistant District Attorney is authorized to discharge all of the District Attorney's duties under Section 17-1-2, N.M.S.A., 1953 Compilation.

The Probate Judge's duties are much more restricted than are the District Attorney's duties. The Probate Judge's powers and duties are enumerated in Chapter 90, Section 48 of the Laws of 1889 and are described as follows:

"The probate of last wills and testaments: the granting letters testamentary and of administration and the repealing or the revocation of the same; the appointment and removal of administrators; the appointment and removal of guardians of orphans and persons of unsound mind; the binding out of apprentices; the settlement and allowance of accounts of executors, administrators and guardians; the hearing and determination of all controversies respecting wills, the right of executorship, administration and guardianship; the hearing and determination of all controversies respecting the duties, accounts and settlements of executors, administrators and guardians; the hearing and determination of all controversies between master and those bound to him; the hearing the determination of all controversies respecting any order, judgment or decree in such probate courts with reference to any of the foregoing matters of which the probate courts are herein given exclusive original jurisdiction; . . ."

See *Frei v. Brownlee*, 56 N.M. 677. The Probate Court has no general, civil, criminal, or other specific jurisdiction authorized by the Constitution for the want of legislative action. See *Dunham v. Stitzberg*, 53 N.M. 81.

From the foregoing, we see no incompatibility between the two offices as defined in *Haymaker v. State*, *supra*. The only possibility of incompatibility would be if the person who is the subject of this opinion were to appear in his own Probate Court in the role of Assistant District Attorney. We are informed that this person will have no authority to handle probate matters in any way, hence, we conclude that there is no incompatibility between the two offices.