

## **Opinion No. 68-32**

March 11, 1968

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Mr. David L. Norvell State Representative P.O. Box E Clovis, New Mexico 88101

### **QUESTIONS**

What are the nature and extent if any of the prohibitions or restrictions, in view of Article 4, Sections 27 and 28 of the New Mexico Constitution, on lawyer members of the 28th Legislature, with regard to compensation which might be paid to said lawyers, either piecemeal or by contract, under the indigent defense provisions of House Bill No. 2.

### **CONCLUSION**

See analysis.

### **OPINION**

#### **{\*56} ANALYSIS**

The Indigent Defense Act is found in Sections 58 through 68 of Chapter 69, Laws 1968. This Act becomes effective July 1, 1968. {\*57} The Act provides for the representation, by attorneys, of needy persons as defined therein. The right to representation includes post-conviction remedies. The act provides for the appointment of attorneys and provides for the payments of a fee and the reimbursement of direct expense to these appointed attorneys. Permissible fees are set out in Subsection B of Section 65. Section 66 provides in part as follows:

"Section 66. CONTRACTUAL SERVICES OF COUNSEL. -- In order to facilitate representation in matters arising before appearance in any court in matters covered by the Indigent Defense Act, the director of the administrative office of the courts may, upon direction of the supreme court with respect to habeas corpus proceedings initiated in the supreme court, or upon request of a district court, enter into contracts with attorneys designated by these courts whereby the attorney shall undertake to perform the services of assigned counsel in all or any specified portion of the cases originating within the judicial district."

The present authority for the appointment of counsel for indigent defendants is contained in Sections 41-11-2, 41-11-3 and 41-15-8, N.M.S.A., 1953 Compilation. Sections 41-11-2 and 41-11-3 have been repealed by Chapter 69. For a discussion of the present authority for appointment and payment of attorneys for indigent defendants see Attorney General Opinion No. 66-27 dated March 2, 1966. The present authority does not contain a provision comparable to Section 66 quoted above.

Section 28, Article IV, Constitution of New Mexico provides in part:

". . . nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, **be interested directly or indirectly in any contract** with the state or any municipality thereof, which was authorized by law passed during such term." (Emphasis added).

Consequently we can see the problem that arises for the attorney-legislators in the Second Session of the Twenty-Eighth Legislature which enacted Chapter 69, the problem you have presented in your question.

There are two decisions by our Supreme Court which, in our opinion, are controlling in the present situation. In **State ex rel., Baca v. Otero**, 33 N.M. 310, 267 Pac. 68 the Supreme Court held that the relator could hold the office of rural school supervisor because the authority to make the contract of employment was enacted when relator was not a member of the legislature. Apparently what was passed while Relator was a member of the legislature was the general appropriations act containing a salary for the position. In **State v. State Highway Commission**, 38 N.M. 482, 35 P.2d 308 the Supreme Court held that the Highway Commission could purchase insurance from a legislator who served at the time the coverage for Highway Commission employees was broadened. The Court used the rationale that the power to purchase had previously existed and the broadening of the coverage would not invalidate a contract made pursuant to the later law.

It is our opinion that under the rationale of the decisions just noted the attorney-legislators who served in the second-session of the twenty-eighth legislature can continue to be appointed to represent indigent defendants and that they can receive fees and expenses as authorized in the Indigent Defense Act. However, it is our opinion that these appointments will have to be on a time to time basis. That is to say such attorney-legislator would be precluded from entering into a contract authorized by Section 66 of the Indigent Defense Act. The power to appoint {*\*58*} and pay attorneys for the defense of indigent defendants existed prior to the Second Session of the Twenty-Eighth Legislature. There have been only two significant changes. One is the fee schedule and the other the contract section. Contracts are the specific subject of Article IV, Section 28 of the New Mexico Constitution. It is our opinion that the establishment of a fee schedule does not preclude the attorney-legislators from being appointed and paid under that schedule. But it is our opinion that for an attorney-legislator who served when the Indigent Defense Act was enacted to enter into a contract under Section 66 of Chapter 69 would violate Section 28, Article IV of the Constitution of New Mexico. It should also be noted that the prohibition in Section 28, *supra*, lasts only for one year after the term for which the legislator was elected.

By: Roy G. Hill

Assistant Attorney General