



February 12, 2024

OPINION
OF
RAÚL TORREZ
Attorney General

Opinion No. 2024-04

By: James Grayson
Chief Deputy Attorney General

Emily Bowen
Assistant Attorney General

To: Representative Andrea Reeb
New Mexico House of Representatives

Re: Legislator Serving as Special Prosecutor

QUESTION:

May a member of the Legislature simultaneously serve as a special assistant district attorney, appointed pursuant to NMSA 1978, § 36-1-23.1 (1984), without violating the separation of powers doctrine under the New Mexico Constitution?

ANSWER:

Yes.

I. Introduction

Whether an elected legislator may serve as a special assistant district attorney without violating the separation of powers doctrine of the New Mexico Constitution is a question of first impression that has not been answered by New Mexico’s appellate courts. Article III, Section 1 of the New Mexico Constitution provides that “no person or collection of persons charged with the exercise of powers properly belonging to [the legislative, executive, or judicial] department shall exercise any powers properly belonging to either of the others.” This section of the Constitution “articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty.” *State ex rel. Taylor v. Johnson*, 1998-NMSC-

015, ¶ 20, 125 N.M. 343. “The Legislature makes, the executive executes, and the judiciary construes, the laws.” *State v. Fifth Judicial District Court*, 1932-NMSC-023, ¶ 9, 36 N.M. 151. The separation of powers doctrine is not absolute and “permits some overlap of governmental functions.” *Johnson*, 1998-NMSC-015, ¶ 23. One branch, however, cannot “unduly encroach[] or interfere[] with the authority of another branch.” *Id.*

A state representative is a member of the House of Representatives, which together with the Senate exercises the legislative power of the State. N.M. Const. art. IV, §§ 1, 3. A legislator’s role in government is to “creat[e] and develop[] public policy” with the creation of substantive law through the legislative process. *Johnson*, 1998-NMSC-015, ¶ 21. As a general proposition, a legislator cannot exercise the powers of the executive or the judiciary. The New Mexico Constitution protects against legislators exercising core executive or judicial functions in part by prohibiting service as a legislator by any person “who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary,” N.M. Const. art. IV, § 3(A), and prohibiting a legislator from being appointed to a civil office in the state during the legislator’s term of office, N.M. Const. art. IV, § 28. In determining whether the separation of powers doctrine prevents a legislator from serving as a special assistant district attorney, it is necessary to examine the source and nature of authority exercised by a district attorney and the nature of the authority delegated to a special prosecutor under Section 36-1-23.1, as well as the occupation of the special prosecutor as a public prosecutor or private attorney.

II. The Constitutional and Statutory Powers of the District Attorneys

District attorneys in New Mexico are “the law officer[s] of the state and of the counties within [their] district[s].” N.M. Const. art. VI, § 24. Among other duties, the district attorneys “prosecute and defend for the state in all courts of record of the counties of [their] district all cases, criminal and civil, in which the state or any county in [their] district may be a party or may be interested.” NMSA 1978, § 36-1-18(A)(1) (2001). This power at the county and district level is similar to the statewide power of the Attorney General to “prosecute and defend in any [trial level] 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.” NMSA 1978, § 8-5-2(B) (1975); *see State v. Naranjo*, 1980-NMSC-061, ¶ 11, 94 N.M. 407 (“Section 8-5-2(B) grants the attorney general concurrent power with the district attorneys to prosecute criminal offenses.”).

New Mexico courts have consistently described the prosecutorial role of a district attorney as quasi-judicial. *State v. Gonzales*, 2005-NMSC-025, ¶ 35, 138 N.M. 271 (“[I]n New Mexico prosecutors are viewed as quasi-judicial officers.”); *State ex rel. Ward v. Romero*, 1912-NMSC-011, ¶ 22, 17 N.M. 88 (“Under our Constitution, the district attorney is part of the judicial system of the state. His duties, powers, and functions are dealt with under the head of ‘judicial department.’ He is a quasi judicial officer.”); *State v. Robinson*, 2008-NMCA-036, ¶ 16 143 N.M. 646; *State v. Hill*, 1975-NMCA-093, ¶ 14, 88 N.M. 216; *State v. Chambers*, 1974-NMCA-058, ¶ 28, 86 N.M. 383. This description is consistent with the special ethical responsibility of a

prosecutor, who acts as a minister of justice “to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” Rule 16-308 NMRA comm. cmt. For this reason, a prosecutor may be disqualified from prosecuting a particular case or defendant based on a personal bias “that creates an opportunity for conflict or other improper influence on professional judgment.” *Gonzales*, 2005-NMSC-025, ¶ 39. This requirement of neutrality is similar to, but less stringent than, the standard applied to judges. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987). Rule 16-308 and the due process requirement of neutrality also apply to the prosecutorial role of the Attorney General. *See State v. Armijo*, 1994-NMCA-136, ¶ 48, 118 N.M. 802.

Consistent with the courts’ designation of district attorneys as quasi-judicial officers, the New Mexico Constitution establishes the office of district attorney in Article VI, the Judicial Department. Notably, however, the Attorney General, who serves a similar prosecutorial role in criminal cases but also exercises broader powers that include acting as solicitor general and legal advisor to the executive and legislature branches, *see State ex rel. Attorney General v. Reese*, 1967-NMSC-172, ¶¶ 22, 29, 78 N.M. 241, is an executive officer in the Executive Department. N.M. Const. art. V, § 1. Indeed, the exercise of prosecutorial powers is independent of judicial authority. *See State v. Brule*, 1999-NMSC-026, ¶ 14, 127 N.M. 368 (explaining that “it is the [D]istrict [A]ttorney who is elected by the people of this state to decide this very question of what charges to bring and what people to prosecute in the best interest of the people of the State of New Mexico”) (alteration in original) (quoted authority omitted).¹ “[C]ourts must be wary not to infringe unnecessarily on the broad charging authority of district attorneys” *State v. Santillanes*, 2001-NMSC-018, ¶ 21, 130 N.M. 464; *see Armijo*, 1994-NMCA-136, ¶ 48 (“For a court to forbid the attorney general from engaging in a prosecution within the jurisdiction of the office is a serious encroachment on the executive branch.”). For separation of powers purposes, the power to prosecute has traditionally been viewed as part of the core executive function of enforcing the laws enacted by the legislative branch. *See, e.g., United States v. Texas*, 599 U.S. 670, 678-79 (2023). District attorneys are quasi-judicial officers in New Mexico, but their principal authority is executive in nature.

III. The Authority of Assistant District Attorneys and Special Assistant District Attorneys

The district attorneys may appoint licensed attorneys as assistants, and those assistants may appear in court and “therein discharge any duties imposed by law upon or required of the [appointing] district attorney.” NMSA 1978, § 36-1-2 (1984). District attorneys and their assistants are prohibited from engaging in the private practice of law. NMSA 1978, § 36-1-4 (1975). Assistant district attorneys are employees of the district attorney, and their employment and compensation is governed by the District Attorney Personnel and Compensation Act. *See* NMSA

¹ It is significant that district attorneys do not exercise the essence of judicial power, which is “to construe laws and render judgments in the cases that come before [the courts].” *State ex rel. N.M. Judicial Standards Comm’n v. Espinosa*, 2003-NMSC-017, ¶ 13, 134 N.M. 59.

1978, § 36-1A-4(A) (1991) (providing that the Act applies to all employees in a district attorney's office).

When a district attorney has a conflict of interest or is unable to prosecute a specific case for other good cause, such as “a lack of resources or an unexpected increase in caseload,” N.M. Att’y Gen., No. 08-06 (Nov. 6, 2008), the district attorney may appoint a licensed attorney as a special assistant district attorney. NMSA 1978, § 36-1-23.1 (1984). Under this statutory authority, a district attorney may appoint either private counsel or “other public prosecutors.” *State v. Surratt*, 2016-NMSC-004, ¶ 16, 363 P.3d 1204. Accordingly, there is no prohibition against engaging in the private practice of law while a private attorney serves as a special assistant district attorney equivalent to the prohibition for an assistant district attorney.

A special assistant district attorney is not an employee of the appointing district attorney. The special prosecutor appointment is for a single matter: “Any person so appointed shall have authority to act only in the specific case or matter for which the appointment was made.” Section 36-1-23.1. With respect to that specific case or matter, a special assistant district attorney “step[s] into the shoes” of the district attorney and exercises “the same power and authority” as the district attorney. *Surratt*, 2016-NMSC-004, ¶ 30. The special assistant district attorney, however, “does not displace the prosecuting attorney from his [or her] constitutional office.” *Id.* ¶ 26 (quoting *Weems v. Anderson*, 516 S.W.2d 895, 901 (Ark. 1974)).

IV. A legislator is not prohibited from serving as a private special assistant district attorney.

As noted above, Article III, Section 1 of the New Mexico Constitution prohibits a person charged with the exercise of the powers of one branch of government from exercising the powers of the other branches of government. For this provision to apply, the person must be a public officer “invested with sovereign power.” *State ex rel. Stratton v. Roswell Indep. Schs.*, 1991-NMCA-013, ¶ 30, 111 N.M. 495. This requirement “exists because the evil to be prevented is that of one branch treading outside its constitutional boundary into the area of another.” *Id.* Public employees, as opposed to public officers, do not “establish policy” for the state or exercise sovereign power. *Id.* ¶ 31. As a result, Article III, Section 1 “applies to public officers, not employees, in the different branches of government.” *Id.* ¶ 35.

In *Roswell Independent Schools*, the Court of Appeals addressed whether a legislator could serve as a public school teacher. An Attorney General opinion had previously concluded that it would violate the separation of powers doctrine for a legislator to serve in this dual capacity, and a school teacher serving as a legislator filed an action for declaratory judgment. *Id.* ¶ 5. The Court of Appeals used a test for evaluating whether an individual serves as a public officer or public employee applied by the New Mexico Supreme Court in *State ex rel. Gibson v. Fernandez*, 1936-NMSC-027, 40 N.M. 288. Quoting Montana precedent, the Court said in *Fernandez* that:

[F]ive elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred

by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional.

Id. ¶ 10 (quoted authority omitted). Although Montana had described all five elements as indispensable, the Supreme Court clarified that, in New Mexico, many of those elements should be viewed as “circumstances” but a public office is defined by the indispensable requirement of a vesting of sovereign power by the Constitution or the Legislature. *Id.* ¶ 24.

Relying on this test, the Court of Appeals in *Roswell Independent Schools* rejected the Attorney General opinion and determined that a public school teacher is a public employee, not a public officer. 1991-NMCA-013, ¶ 35. A school teacher’s relationship to the school board is merely contractual, and a school teacher does not exercise sovereign authority in a way that would prevent the teacher from serving as a legislator. *Id.* ¶¶ 31, 35.

A district attorney occupies an office of trust, is a quasi-judicial officer, and exercises core executive functions. As a result, a district attorney is constitutionally ineligible to serve as a member of the legislative branch. Likewise, an assistant district attorney, who is employed by, acts on behalf of, and exercises the authority of the district attorney, is a public officer. N.M. Att’y Gen., No. 62-98 (1962). A legislator therefore cannot serve as an assistant district attorney. N.M. Att’y Gen., No. 41-3866 (1941).²

A special assistant district attorney must take the same oath as an assistant district attorney. Section 36-1-23.1. In addition, a special district attorney exercises the power of the district attorney. *Surratt*, 2016-NMSC-004, ¶ 30. However, the Legislature carefully circumscribed this power to the case or matter for which the special assistant is appointed. In addition, a private attorney appointed as a special assistant is neither a public officer nor a public employee. The private special assistant instead exercises a power that is “only temporary or occasional.” *Fernandez*, 1936-NMSC-027, ¶ 10. A legislator’s appointment to such a role does not unduly

² Despite this separation of powers restriction, we offer no opinion on whether a criminal defendant would have standing to raise such a claim or would suffer prejudice from such conduct. *See State v. Eighth Judicial District Court*, 510 P.3d 138, 2022 WL 1594372, n.3 (Nev. 2022) (unpublished) (declining to reach the merits of a criminal defendant’s unpreserved complaint of improper influence due to a prosecutor serving in a dual role as a legislator but observing that such a claim does not establish prejudice or a miscarriage of justice).

encroach upon or interfere with the authority of the executive or judicial branches. For these reasons, a private attorney's isolated exercise of district attorney authority while serving as a special assistant district attorney and a legislator does not violate the separation of powers doctrine in Article III, Section 1 of the New Mexico Constitution.

V. Conclusion

We determine that a private attorney serving as both a legislator and a special assistant district attorney in isolated cases or matters does not violate the separation of powers doctrine under the New Mexico Constitution. Please let us know if our office may be of further assistance. You have requested an opinion on this question. The request and the opinion provided herein are public documents and will be published to our website and made available to the general public.

By:



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