

## Opinion 09-03

**OPINION OF: GARY K. KING** Attorney General

October 14, 2009

**BY:** Zachary Shandler, Assistant Attorney General

**TO:** Honorable Chief Justice Edward Chavez, N.M. State Supreme Court, PO Box 848,  
Santa Fe, NM 87504-0848

### QUESTION:

Do state judges have the authority to administer an oath of office to an elected official?

### CONCLUSION:

State judges may administer an oath of office to an elected official.

### ANALYSIS:

The concept of speaking, or taking, an oath is a long-standing matter. The common law focuses on the person taking the oath. "It was widely believed that a god, when called upon, would witness the truth of the speaker's statement and, if the speaker spoke falsely, would smite him." Eugene Milhizer, *So Help Me Allah: An Historical & Prudential Analysis of Oaths*, 70 Ohio St. L.J. 1, 9 (2009). The English case of Omychund v. Barker, 26 Eng. Rep. 15 (K.B. 1744.), established "that an oath taker should be permitted to swear an oath using a form that he finds binding on his conscience." *Id.* at 60. This "common law practice of allowing a witness to be sworn by whatever means were most binding on his conscience would be brought to the New World." *Id.* at 27.

The framers of the United States Constitution focused on the person taking the oath. For example, they provided an oath for the President in Article II, but:

[t]he Constitution does not specify who administers the oath. At George Washington's inauguration the oath was administered by the chief justice of New York State, Robert R. Livingston, because the Supreme Court had not yet been appointed. Since the inauguration of John Adams, it has been the custom for the oath to be administered by the chief justice of the United States at all regular inaugurations. However, federal judges, magistrates, state judges, and even a notary public have administered oaths when Vice Presidents assumed the Presidency after the sudden death of the incumbent. Only three of nine men who succeeded to the Presidency because of death or resignation took their oath from the chief justice of the United States.

<http://www.answers.com/topic/oath-of-office>

The framers of the New Mexico Constitution adopted the same focus. The language reads: “Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath...that he will support the constitution....” N.M. Const. art. XX, § 1. [1]This approach was apparently common in many state constitutions and has resulted in “the oath [of office has been] ... administered by a specific officer by tradition or law.”

<http://www.wvsos.com/execrecords/appointments/oaths.htm>. Some states, such as New Mexico, appear to rely on custom and tradition. For example, Governor Bill Richardson was sworn into office in 2007 and “broke with tradition and insisted on being sworn in by a Pueblo governor instead of the New Mexico Supreme Court Chief Justice.”

[www.info.sindnlaw.com](http://www.info.sindnlaw.com). Other states have memorialized this matter into law. See, e.g. W. VA. Code § 6-1-4 (1863) (“Any oath of office may be taken in this state before any court of record or before any person having at the time authority to administer oaths.”).

Scholarship of the common law indicates that the judiciary’s early association with religious authority may have made them a logical participant in the traditional practices. “The Old Testament describes the use of ... outward signs for making oaths...placing hands on an object ... or shaking hands to signify the swearing of a solemn oath to God followed by a spoken response of ‘Amen, Amen’ after a magistrate has repeated the words of an oath.” Eugene Milhizer, *So Help Me Allah: An Historical & Prudential Analysis of Oaths*, 70 Ohio St. L.J. 1, 9 (2009). The judiciary’s participation, even as the branch transitioned from religious authority to civil authority, appears to have remained a fixture in the process. As a result, it is still commonly viewed that a judge or a former judge has customary or even “inherent authority to administer an oath.” 67 C.J.S. Oaths and Affirmations § 4 (2002).

The New Mexico legislature has enacted a statute that lists certain civil officials who may administer oaths to elected officials. See NMSA 1978, § 14-13-3 (1977) (“The Secretary of state of New Mexico, county clerks, clerks of probate courts, clerks of district courts, clerks of magistrate courts...and all duly commissioned and acting notaries public, are hereby authorized and empowered to administer oaths and affirmation in all cases where magistrates and other officers within the state authorized to administer oaths may do so...”). This statute, however, does not operate as the exclusive list of such officials. First, there is no language in the statute that requires it to be an exclusive list. Second, there are other state statutes that grant different officials, such as municipal election clerks and county commission chairpersons, the authority to administer oaths. [2] See NMSA 1978, § 4-38-11 (1953); NMSA 1978, § 3-8-33(B) (amended through 1995). “We ... presume that the legislature did not intend to enact a law inconsistent with existing law.” State ex rel. Quintana v. Schnedar, 115 N.M. 573, 575, 855 P.2d 562 (1993). Therefore, we believe that Section 14-13-3 should be read to supplement, not limit, the traditional practices in New Mexico.

Absent further legislative clarification on this matter, we conclude that a state judge may continue with custom and tradition and administer an oath of office to an elected official.

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[1] New Mexico law, like the common law, allows the person to speak words that are most binding on his conscience, as the law requires only that the oath begin "I do solemnly swear" and end with "so help me God." NMSA 1978, § 14-13-1 (1941).

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