

From: ["Andrea Romero"](#)

To: ["James Grayson" <JGrayson@nmag.gov>](#)

Date: 3/5/2026 2:17:59 PM

Subject: DA work for legislators

Hi James,

I'm reaching out to request verification that legislators can work in our district attorney's office so long as we are not acting in our capacity as district attorneys or with that authority. I am looking to discuss employment opportunities with our local DA's office in the First Judicial District and just wanted to be sure that there are no conflicts with my legislative work.

I was reading through this recent opinion: <https://nmonesource.com/nmos/ag/en/item/18966/index.do>

Thank you so much,
Andrea

--

Representative Andrea Romero
Gender pronouns: she/her/ella
New Mexico House of Representatives, District 46
P.O. Box 32963, Santa Fe, NM 87594
andrea@andrearomero.com
andrearomero.com
505/490.6155

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

From: ["James Grayson"](#)

To: ["Andrea Romero" <andrea@andrearomero.com>](mailto:andrea@andrearomero.com)

Date: 3/8/2026 6:07:00 PM

Subject: Re: DA work for legislators

Good afternoon Representative,

Under AG Opinion 2024-04, a district attorney's office has two types of positions: (1) public officers, which includes the district attorney and all deputy and assistant district attorneys; and (2) public employees, which includes all staff in the office that do not exercise the authority of the district attorney. Separation of powers principles for purposes of a legislator's employment apply only to the former, that is, public officers, because those are the individuals that exercise a core executive function.

AG Opinion 2024-04 addresses whether the constitutional separation of powers prohibits a legislator from serving as a special prosecutor under NMSA 1978, § 36-1-23.1 (1984), and the opinion concludes that there is no constitutional impediment to a legislator serving in this capacity. This conclusion is based on an analysis of the indicia of public office adopted in *State ex rel. Gibson v. Fernandez*, 1936-NMSC-027, 40 N.M. 288, and particularly on the limitation of a special prosecutor's authority to an individual matter. Relying on the five-factor test from *Fernandez* and AG Opinion 41-3866, the opinion observes that legislators cannot serve as assistant district attorneys. The reason for this prohibition is that, by statute, assistant district attorneys take the oath of office required of district attorneys, which is filed with the court, and ADAs exercise the authority of the district attorney. See NMSA 1978, § 36-1-2 (1984). These individuals occupy a public office and exercise sovereign executive power.

District attorneys, however, are statutorily authorized to hire not only assistant district attorneys but "other personnel" and to assign the duties for the other personnel. NMSA 1978, § 36-1-5(A)(1) (1988). Those "other" employees do not take the oath of office for a district attorney, do not exercise the authority of the district attorney, and do not have statutorily assigned duties. Under the *Fernandez* test, they are public employees, not public officers, and they are similar in this way to public school teachers, a position of state employment that may be filled by a legislator under *State ex rel. Stratton v. Roswell Independent Schools*, 1991-NMCA-013, 111 N.M. 495. Thus, there appears to be no separation of powers impediment to legislators serving in these other employment positions in a district attorney's office.

I hope this information is helpful. Please note that this analysis is intended to be only a summary of AG Opinion 2024-04 and is not intended to be a separate Attorney General opinion or advisory letter. Please don't hesitate to get in touch if you have any further questions.

Best regards,

James



James W. Grayson

Chief Deputy Attorney General

Executive Office

State of New Mexico Department of Justice

505-218-0850

JGrayson@nmag.gov

From: Andrea Romero <andrea@andrearomero.com>

Sent: Thursday, March 5, 2026 1:17 PM

To: James Grayson <JGrayson@nmag.gov>

Subject: DA work for legislators

Hi James,

I'm reaching out to request verification that legislators can work in our district attorney's office so long as we are not acting in our capacity as district attorneys or with that authority. I am looking to discuss employment opportunities with our local DA's office in the First Judicial District and just wanted to be sure that there are no conflicts with my legislative work.

I was reading through this recent opinion: <https://nmonesource.com/nmos/ag/en/item/18966/index.do>

Thank you so much,
Andrea

--

Representative Andrea Romero
Gender pronouns: she/her/ella
New Mexico House of Representatives, District 46
P.O. Box 32963, Santa Fe, NM 87594
andrea@andrearomero.com
andrearomero.com
505/490.6155

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

From: ["Andrea Romero"](#)

To: ["James Grayson" <JGrayson@nmag.gov>](#)

Date: 3/9/2026 1:08:46 PM

Subject: Re: DA work for legislators

I had to send my thanks directly to you, James! I so appreciate your thoughtfulness and throughput.

Have a great week and best of luck on the Meta case!

Sincerely,
Andrea

On Sun, Mar 8, 2026 at 5:07 PM James Grayson <JGrayson@nmag.gov> wrote:

Good afternoon Representative,

Under AG Opinion 2024-04, a district attorney's office has two types of positions: (1) public officers, which includes the district attorney and all deputy and assistant district attorneys; and (2) public employees, which includes all staff in the office that do not exercise the authority of the district attorney. Separation of powers principles for purposes of a legislator's employment apply only to the former, that is, public officers, because those are the individuals that exercise a core executive function.

AG Opinion 2024-04 addresses whether the constitutional separation of powers prohibits a legislator from serving as a special prosecutor under NMSA 1978, § 36-1-23.1 (1984), and the opinion concludes that there is no constitutional impediment to a legislator serving in this capacity. This conclusion is based on an analysis of the indicia of public office adopted in *State ex rel. Gibson v. Fernandez*, 1936-NMSC-027, 40 N.M. 288, and particularly on the limitation of a special prosecutor's authority to an individual matter. Relying on the five-factor test from *Fernandez* and AG Opinion 41-3866, the opinion observes that legislators cannot serve as assistant district attorneys. The reason for this prohibition is that, by statute, assistant district attorneys take the oath of office required of district attorneys, which is filed with the court, and ADAs exercise the authority of the district attorney. See NMSA 1978, § 36-1-2 (1984). These individuals occupy a public office and exercise sovereign executive power.

District attorneys, however, are statutorily authorized to hire not only assistant district attorneys but "other personnel" and to assign the duties for the other personnel. NMSA 1978, § 36-1-5(A)(1) (1988). Those "other" employees do not take the oath of office for a district attorney, do not exercise the authority of the district attorney, and do not have statutorily assigned duties. Under the *Fernandez* test, they are public employees, not public officers, and they are similar in this way to public school teachers, a position of state employment that may be filled by a legislator under *State ex rel. Stratton v. Roswell Independent Schools*, 1991-NMCA-013, 111 N.M. 495. Thus, there appears to be no separation of powers impediment to legislators serving in these other employment positions in a district attorney's office.

I hope this information is helpful. Please note that this analysis is intended to be only a summary of AG Opinion 2024-04 and is not intended to be a separate Attorney General opinion or advisory letter. Please don't hesitate to get in touch if you have any further questions.

Best regards,

James

James W. Grayson

Chief Deputy Attorney General

Executive Office

State of New Mexico Department of Justice

505-218-0850

JGrayson@nmag.gov



From: Andrea Romero <andrea@andrearomero.com>

Sent: Thursday, March 5, 2026 1:17 PM

To: James Grayson <JGrayson@nmag.gov>

Subject: DA work for legislators

Hi James,

I'm reaching out to request verification that legislators can work in our district attorney's office so long as we are not acting in our capacity as district attorneys or with that authority. I am looking to discuss employment opportunities with our local DA's office in the First Judicial District and just wanted to be sure that there are no conflicts with my legislative work.

I was reading through this recent opinion: <https://nmonesource.com/nmos/ag/en/item/18966/index.do>

Thank you so much,
Andrea

--

Representative Andrea Romero

Gender pronouns: she/her/ella

New Mexico House of Representatives, District 46

P.O. Box 32963, Santa Fe, NM 87594

andrea@andrearomero.com

andrearomero.com

505/490.6155

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

--

Representative Andrea Romero
Gender pronouns: she/her/ella
New Mexico House of Representatives, District 46
P.O. Box 32963, Santa Fe, NM 87594
andrea@andrearomero.com
andrearomero.com
505/490.6155

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

From: ["Anthony Long"](#)

To: ["James Grayson" <JGrayson@nmag.gov>](#)
andrea@andrearomero.com
["Mary Carmack-Altwies" <MCarmack-Altwies@da.state.nm.us>](#)

Date: 3/10/2026 12:12:56 PM

Subject: DA work for legislators

Hello James

I've looked at the Fernandez case as well as AG opinion 2024-04. I understand the 5-part test, but I'm having a hard time reconciling how an ADA that is hired at an hourly rate is a public "officer" and not a public "employee". I understand that a DA typically appears on a ballot and is a position established by the NM Constitution, is typically elected, has a salary that is set by statute, and is responsible for setting public policy and prosecuting criminal/civil matters. The only one of the previously listed things an ADA does in prosecute.

Taking a look at Chapter 36, specifically where assistants are mentioned, they are viewed similarly as other personnel that are appointed, by the elected DA.

In comparison, looking at a special prosecutor, I'm not seeing a difference other than the temporary or occasional factor. Which appears to be the factor relied upon in 2024-04. Arguably, a special prosecutor has equal autonomy to the elected DA, which is very different than the limited autonomy of an ADA.

If we look at the 5 Fernandez factors, specifically factor 4, then we examine what it means to perform the duties of "an inferior or subordinate office", couldn't it be possible that an ADA is just a public employee and not a public officer?

If we look at Chapter 10, we get a good idea what the difference between a public officer and a public employee is. How does an elected DA get removed from office? There is a procedure. How does an ADA get "removed", they get fired. In fact, they serve entirely at the will of the elected DA. The ADA is a mere employee of the elected DA, clearly a public employee but far from a public official.

I may be swimming upstream, but we would really like to hire Rep. Andrea Romero.

Do you have any time to talk this over?

-Tony

Anthony W. Long

Chief Deputy District Attorney

First Judicial District Attorney's Office

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

From: ["James Grayson"](#)

To: ["Anthony Long" <ALong@da.state.nm.us>](#)

Date: 3/26/2026 5:09:28 PM

Subject: Re: DA work for legislators

Hi Tony,

Sorry for the delay in getting back to you. I've been in trial. Do you want to talk tomorrow?

Best regards,
James

On Mar 10, 2026, at 11:13 AM, Anthony Long <ALong@da.state.nm.us> wrote:

Hello James

I've looked at the Fernandez case as well as AG opinion 2024-04. I understand the 5-part test, but I'm having a hard time reconciling how an ADA that is hired at an hourly rate is a public "officer" and not a public "employee". I understand that a DA typically appears on a ballot and is a position established by the NM Constitution, is typically elected, has a salary that is set by statute, and is responsible for setting public policy and prosecuting criminal/civil matters. The only one of the previously listed things an ADA does in prosecute.

Taking a look at Chapter 36, specifically where assistants are mentioned, they are viewed similarly as other personnel that are appointed, by the elected DA.

In comparison, looking at a special prosecutor, I'm not seeing a difference other than the temporary or occasional factor. Which appears to be the factor relied upon in 2024-04. Arguably, a special prosecutor has equal autonomy to the elected DA, which is very different than the limited autonomy of an ADA.

If we look at the 5 Fernandez factors, specifically factor 4, then we examine what it means to perform the duties of "an inferior or subordinate office", couldn't it be

possible that an ADA is just a public employee and not a public officer?

If we look at Chapter 10, we get a good idea what the difference between a public officer and a public employee is. How does an elected DA get removed from office? There is a procedure. How does an ADA get "removed", they get fired. In fact, they serve entirely at the will of the elected DA. The ADA is a mere employee of the elected DA, clearly a public employee but far from a public official.

I may be swimming upstream, but we would really like to hire Rep. Andrea Romero.

Do you have any time to talk this over?

-Tony

Anthony W. Long

Chief Deputy District Attorney

First Judicial District Attorney's Office

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

From: Anthony Long <ALong@da.state.nm.us>
Sent on: Friday, March 27, 2026 2:59:12 PM
To: James Grayson <JGrayson@nm DOJ.gov>
Subject: Re: DA work for legislators

Hey James

No apologies are needed on any delay. The word on the streets is that you were busy. Congratulations on a huge win, HUGE WIN!

I have been all day today after 11. My direct cell is [REDACTED]

-Tony

Anthony W. Long
Chief Deputy District Attorney
First Judicial District Attorney's Office

From: James Grayson <JGrayson@nm DOJ.gov>
Sent: Thursday, March 26, 2026 4:09 PM
To: Anthony Long <ALong@da.state.nm.us>
Subject: Re: DA work for legislators

Hi Tony,
Sorry for the delay in getting back to you. I've been in trial. Do you want to talk tomorrow?
Best regards,
James

On Mar 10, 2026, at 11:13 AM, Anthony Long <ALong@da.state.nm.us> wrote:

Hello James

I've looked at the Fernandez case as well as AG opinion 2024-04. I understand the 5-part test, but I'm having a hard time reconciling how an ADA that is hired at an hourly rate is a public "officer" and not a public "employee". I understand that a DA typically appears on a ballot and is a position established by the NM Constitution, is typically elected, has a salary that is set by statute, and is responsible for setting public policy and prosecuting criminal/civil matters. The only one of the previously listed things an ADA does in prosecute.

Taking a look at Chapter 36, specifically where assistants are mentioned, they are viewed similarly as other personnel that are appointed, by the elected DA.

In comparison, looking at a special prosecutor, I'm not seeing a difference other than the temporary or occasional factor. Which appears to be the factor relied upon in 2024-04. Arguably, a special prosecutor has equal autonomy to the elected DA, which is very different than the limited autonomy of an ADA.

If we look at the 5 Fernandez factors, specifically factor 4, then we examine what it means to perform the duties of “an inferior or subordinate office”, couldn’t it be possible that an

ADA is just a public employee and not a public officer?

If we look at Chapter 10, we get a good idea what the difference between a public officer and a public employee is. How does an elected DA get removed from office? There is a procedure. How does an ADA get “removed”, they get fired. In fact, they serve entirely at the will of the elected DA. The ADA is a mere employee of the elected DA, clearly a public employee but far from a public official.

I may be swimming upstream, but we would really like to hire Rep. Andrea Romero.

Do you have any time to talk this over?

-Tony

Anthony W. Long
Chief Deputy District Attorney
First Judicial District Attorney's Office

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

From: ["Anthony Long"](#)

To: ["James Grayson" <jgrayson@nmdoj.gov>](#)

Date: 3/27/2026 12:56:35 PM

Subject: Legislator as an ADA

Hi James

Below is what I put together. Thank you for talking with me this morning and looking this over.

-Tony

QUESTION:

May a member of the New Mexico Legislature simultaneously serve as assistant district attorney without violating the separation of powers doctrine under the New Mexico Constitution?

ANSWER:

Yes, the first three levels of attorneys in a district attorney's office may serve, but a Deputy District Attorney and a Chief Deputy District Attorney may not serve simultaneously as a legislator.

NOTE:

The majority of this memo is copied word for word from N.M. Att'y Gen., No. 2024-04 with minor deletions, additions, and rewording.

I. Introduction

Whether an elected legislator may serve as an 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 branch or the judiciary branch of government. The New Mexico Constitution prevents legislators from 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 an 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 an assistant district attorney under Section 36-1-2.

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).

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. 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

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

IV. Prior AG Opinion

N.M. Att’y Gen., No. 41-3866, looked at whether a Legislator could also serve as an Assistant District Attorney. It was the opinion of the Asst. Atty. General at the time that because he viewed an Assistant District Attorney as a civil officer, a member of the Legislature could not be appointed to the office of assistant district attorney. His “ruling” was based on *Satterwhite vs. Garrison* (Calif. 1917), 168 Pac. 1053. That 1917 California case held that a Deputy District Attorney was a public officer, and that a Legislator could not be appointed to that position because of a constitutional prohibition against the appointment of a Legislator to a public office.

The Court in *Satterwhite* focused on some of the hierarchical tiers of employment. They cited a string of cases where they found the person (a supervisor and a superintendent) to be a holder of a civil office and another (a probation officer) where they did not find them to be an officer, but a “minor officer”.

In *People v. Leonard*, 73 Cal. 230, 14 Pac. 853, it was held that a supervisor—who also is a county officer—is the holder of a “civil office of profit under this state.” So also of a county superintendent of schools in *Crawford v. Dunbar*, 52 Cal. 39; and of a sheriff in *Searcy v. Grow*, 15 Cal. 117. We think these cases are not overruled by *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302, which holds that probation officers are not “officers of the state government,” but are “minor officers of the local county government”; the term “officers of the state government” being evidently much more restricted and of narrower import than the clause of the Constitution now under consideration. *Satterwhite v. Garrison*, 34 Cal. App. 734, 736, 168 P. 1053, 1054 (Cal. Ct. App. 1917)

N.M. Att’y Gen., No. 62-98, looked at whether a City Attorney could also function as an Assistant District Attorney. The opinion concluded that both positions were “public offices” within the contemplated statutes, but the two offices were not “fatally incompatible” so as to prohibit the same person from doing both jobs at the same time.

Stratton v. Roswell Independent Schools, 1991-NMCA-013 held that school teachers and administrators who were also Legislators were not State employees under NMSA 2-1-3 and -4. Stratton also said, “Article III, section 1 ensures that “one branch of state government” will not “exercise powers and duties belonging to another.” *State ex rel. State Corp. Comm’n v. McCulloh*, 63 N.M. 436, 438, 321 P.2d 207, 208 (1957). In *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 P. 411 (1927), the Montana Supreme Court developed a separation of powers analysis that distinguished between a public officer who is invested with sovereign powers and an ordinary employee who is not. *Hawkins* held that only state officers vested with the powers of government exercise authority within the contemplation of a separation of powers provision identical to that of New Mexico. The Montana court developed a five-part test for determining whether an employee is a public officer, which test New Mexico has adopted. See *State v. Quinn*, 35 N.M. 62, 290 P. 786 (1930). One New Mexico decision stressed one of these factors as most important -- to be a public officer, the person must be invested with sovereign power. *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 292, 58 P.2d 1197, 1200 (1936). The requirement of sovereign power being invested in the individual alleged to be violating separation of powers principles exists because the evil to be prevented is that of one branch treading outside its constitutional boundary into the area of another.”

The Court in *Fernandez* stated, “...that five 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. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper

authority."

In the very next paragraph, the Court of Appeals held that "Public school instructors and administrators are not "public officials." They do not establish policy for the local school districts or for the state department of education. Stratton conceded that public school instructors and administrators do not hold "office" as that term is used in the constitution. Yet, he has not attempted to explain how teachers excise "sovereign power." Instead, he attempts to bootstrap the separation of powers argument to the argument that teachers, as employees of the school districts, are part of the executive power, contending that this conclusion necessarily follows from the premise that school districts are but arms of the state."

V. Current Attorney Hierarchy of District Attorney's Offices

DA's Offices are governed by the District Attorney's Office Personnel Plan. NMSA 36-1a-1. Under this plan, there are 5 separate classes of attorneys within a District Attorney's Office (excluding the elected District Attorney). A summary of the five positions is laid out below:

- **Assistant Trial Attorney**

- **Purpose** – This position provides for the prosecution of criminal and non-criminal cases.
- **Examples of Work Performed** – Incumbent handles a variety of misdemeanors and lower-level felony cases, such as DWIs and bad check cases; does legal research for felony cases for higher level Attorneys; assists in trial teams; works with law enforcement at crime scenes; performs non-prosecution duties such as community outreach; participates on boards and task forces and other groups as assigned; may be required to take an on-call rotation; and performs other related job duties. Felony work is performed under supervision
- **Distinguishing Characteristics** - This an entry level position of the attorney series.

- **Trial Attorney**

- **Purpose** – This position provides for the prosecution of criminal and non-criminal cases.
- **Examples of Work Performed** – Incumbent handles felony cases under supervision, for example adult and juvenile burglaries, property crimes, armed robberies, drug trafficking, mental commitments, probation violations; takes rotation as on-call attorney; performs legal research for other attorneys; assists in trial teams; performs non-prosecution duties as assigned; may advise/assist entry level attorneys at the discretion of the district attorney; works with law enforcement at crime scenes; performs non-prosecution duties such as community outreach; participates on boards and task forces and other groups assigned; performs other related job duties under possible supervision.
- **Distinguishing Characteristics** - This is the second level position of the attorney series.

- **Senior Trial Attorney**

- **Purpose** – This position provides for the prosecution of criminal and non-criminal cases.
- **Examples of Work Performed** – Incumbent may handle all levels of crimes. May undertake special projects such as community education projects and law enforcement training. Leads or assists in trial teams; performs other non-prosecution duties as assigned; supervises or mentors other attorneys and/or staff, performs training for staff and law enforcement; works with law enforcement at crime scenes; performs non-prosecution duties such as community outreach; participates on boards and task forces and other groups assigned; performs other related job duties; complex felony work may be under supervision.
- **Distinguishing Characteristics** - This is an advanced level position of the attorney series.

- **Deputy District Attorney**

- **Purpose** – This position provides for the prosecution of criminal and non-criminal cases. The incumbent is contemplated to be a career prosecutor and/or provide management for an office division or bureau. **The incumbent can act on behalf of the District Attorney as directed.**
- **Examples of Work Performed** – Incumbent may prosecute all cases, including high level or high-profile cases. Incumbent may possess expertise in one or more areas of criminal prosecution; leads special prosecutions assigned by the District Attorney; supervises or mentors other attorneys and/or staff. Incumbent may be required to train law enforcement, assist law enforcement at crime scenes, performs non-prosecution duties such as community outreach; participates on boards and task forces and other groups as assigned.
- **Distinguishing Characteristics** - This is an advanced level position of the attorney series.

- **Chief Deputy District Attorney**

- **Purpose** – This position is the highest level of administrative and/or management authority, excluding that of the District Attorney. The incumbent may prosecute certain high profile or other significant cases. **The incumbent can act on behalf of the District Attorney in his/her absence or as directed.**
- **Examples of Work Performed** – The primary role is management; however, incumbent may handle criminal cases at all levels. Incumbent will also mentor lower-level attorneys. **Represents District Attorney at official functions and before legislative bodies. May interact with the media and the community at a case or policy level. Ensures compliance by all other employees with the District Attorney's policies and directives and advises the District Attorney on employment issues.** Incumbent works with law enforcement at crime scenes; performs non-prosecution duties such as community outreach; participates on boards and task forces and other groups as assigned; provides training to law enforcement agencies as requested; performs other job-related duties.
- **Distinguishing Characteristics** - **This position is the highest administrative level of the attorney series and is characterized by the high level of trust, discretion and judgment vested in the incumbent by the District Attorney and the breadth of their responsibilities.**

VI. **A Legislator is not prohibited from serving as an Assistant District Attorney**

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.

An assistant trial attorney, trial attorney, and senior trial attorney do act on behalf of the District Attorney. They are vested with prosecution power by the District Attorney, but these three positions have no policy making authority and in fact their extremely limited discretion is entirely case-related. In looking at N.M. Att’y Gen., No. 41-3866 in conjunction with the Job Specifications for attorneys within a New Mexico District Attorney’s Office, a DDA may legitimately be excluded from being a Legislator, or vice versa. It is an overreaching stretch to apply that same limitation to

an assistant trial attorney, trial attorney, and senior trial attorney. These three positions are not vested with sovereign power but instead have extremely limited discretion to act only on case matters, never policy matters or on behalf of the elected District Attorney.

Anthony W. Long
Chief Deputy District Attorney
First Judicial District Attorney's Office

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.