Opinion No. 32

County Attorney—City Attorney—Incombatibility.

Held: A county attorney may not accept appointment as city attorney while he holds the former office. A county attorney, in his private capacity as an attorney, may act as prosecuting attorney for a city and accept a fee therefor. A county attorney, in his private capacity as an attorney, may act as attorney for a city in civil matters, so long as the county or state is not a party, or their interests involved. He may accept a fee for such services.

April 24, 1945.

Mr. Oliver Phillips
County Attorney
Lincoln County
Libby, Montana

Dear Mr. Phillips:

You have requested my opinion on the following questions:

"1. Would it be legal for the county attorney, in his private capacity as an attorney, to act as prosecuting officer for a city in preparing complaints for violations of city ordinances? Could he prosecute for such violations in the municipal

courts? Would it be legal for him to charge and accept a fee for such legal services?

"2. Could the county attorney, in his private practice, act for the city in civil matters, where there is no contest with the county or its subdivisions or officers? Could he legaly charge and receive a fee for such services?

"3. Could the county attorney legally receive a retainer fee from the city to represent the city in criminal and civil matters where such duties do not conflict with his obligations as county attorney to the county, its subdivisions or officers?"

In the absence of statutory or constitutional prohibition, there is no legal reason why one person may not hold two offices at the same time, except in cases where the offices are incompatible or in cases where the holding of both offices would be improper from considerations of public policy.

I find no statutory or constitutional prohibition against the holding of the office of county attorney and city attorney. It therefore remains to determine whether the offices are incompatible.

The general rule applied by the courts in determining whether one office is incompatible with another is stated and approved in the case of State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 Pac. 648. In the Wittmer case, the court enumerates the tests to be applied and cites authority upholding the several tests. The tests enumerated therein, omitting the authorities, are: (1) when one has power of removal over the other; (2) when one is in any way subordinate to the other; (3) when the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both.

It is, of course, necessary to determine the question in each particular instance on the facts presented. In the instant case, we have the offiec of county attorney and city attorney involved. The office of county attorney is one provided by the Constitution and the qualification and term of office as therein provided, but the duties and emoluments are prescribed by statute under authority of the Constitution. (Article VIII. Section 16 of the Montana Constitution, and Sections 4819 to 4823, Revised Codes of Montana, 1935). The office of city attorney is one provided by statute and the appointment, term, duties and emolument are provided by statute or by ordinance. (Sections 4995, 5023, 5038, Revised Codes of Montana, 1935.) Both have definite terms and the incumbent of each is required to take an oath. Each is a public officer, as distinguished from an employee.

In each case, the statute prescribes the duties of the officer. One of the important duties of these officers is to act as the legal adviser of the county or the city. Considering the relationship between counties and cities, it is easy to see there might be a conflict of duty were both offices held by the same person. For instance, the city and county very often enter into contracts with each other. Frequently, a legal question under such contracts arises. In such a case, it would be improper from consideration of public policy that the two offices be held by one person. Numerous instances might be cited where such conflict would arise. It would therefore appear to me the two offices are incompatible on the ground that the nature and duties are such as to render them incompatible from considerations of public policy.

A county attorney is not prohibited from engaging in the general practice of his profession aside from his duties as such officer, so long as the interests of the coutny or the state are not involved. There would seem to be no valid objection to a county attorney performing legal services for a city so long as such services do not conflict with his duties as county attorney, or involve the interests of the county or the state.

It is therefore my opinion:

1. A county attorney may not accept appointment as city attorney while he holds the former office.

2. A county attorney, in his private capacity as an attorney, may act as prosecuting attorney for a city, and accept a fee therefor.

3. A county attorney, in his private capacity as an attorney, may act as attorney for a city in civil matters, so long as the county or state is not a party, or their interests involved. He may accept a fee for such services.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General