

## Opinion No. 51-5377

June 27, 1951

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Judge A. W. Marshall Sixth Judicial District Deming, New Mexico

{\*59} In our telephone conversation early last week, you asked for an opinion regarding HB 45 of the 1951 Legislature. You mentioned that your present term of court commenced the third Monday in April of this year, but that the jury panel was selected under the "old plan," in March. You also stated that your jury cases are to commence July 16, and you asked whether, in view of HB 45, you were obliged to draw a new jury panel.

I am enclosing a copy of Attorney General's Opinion No. 5355, which may prove helpful since it relates to the general subject of your request, and also quotes pertinent portions of the bill.

In my opinion, in the case of your district, a new jury panel need not be drawn for the present term. Attorney General's Opinion No. 5355, in interpreting HB 45, points out that the effective date of this Act is June 9, 1951 and that "30 days after passage of this Act" is to be construed as meaning July 9, 1951. This means, first, of course, that no woman was eligible for jury service in New Mexico until June 9, 1951. Secondly, the opinion states that the clerk of the district court need not have the list referred to in Sec. 2 of HB 45 (amending Sec. 30-103, N.M.S.A.) prepared and certified until July 9, 1951.

The later date is just one week prior to the commencement of your jury cases on July 16. The practical difficulty of having the jury commissioners draw up a jury list from the clerk's data, the selection of the panel by the judge and the clerk, and the serving of the jurors selected, all within the period of one week, might, itself, be of sufficient force to justify retention of the present panel. In particular, it seems unlikely that an officer charged with serving within a period of a few days the jurors drawn, could exercise that "extraordinary diligence to serve all persons whose names are found upon such venire." See N.M.S.A. Sec. 30-125.

But there is, in my opinion, a more forceful argument for the contention that the present panel may be retained. N.M.S.A. § 30-116 says, in part:

"Not more than 90 days before the first day of any term of each district court to be held in any county in this state, when the judge of the district court shall deem it necessary {\*60} that grand and petit juries should be summoned for service at such term, it shall be the duty of the judge of the district court with the assistance of the clerk of the court, \* \* \* \* to draw from the jury box a sufficient number of names to constitute the petit jury at the ensuing term of court."

I construe the first portion of this quote as giving equal force to the terms "90 days" and "before." In other words, although 90 days is expressed as an outside limit, before which time the names shall not be drawn, this sentence also means that such action by the clerk and the judge shall be taken **before** the commencement of the term. Again, the drawing shall take place some time between the first day of the term and 90 days previous thereto. I believe that the last sentence of § 30-116 lends support to the foregoing conclusion:

"When for any reason a venire has not been drawn for any term, the district judge in open court **during such term**, may draw, in the manner herein provided, either grand or petit juries to serve during such term, without the giving of any notice."

It can be contended that this last sentence of § 30-116 is strong evidence that the first portion of this section, discussed previously, is directory, not mandatory. See also 50 Am. Jur. 46. In my opinion, however, it makes no difference whether it is mandatory or directory. Even if it is the latter, the judge and clerk in drawing a jury panel in March have strictly complied with that portion of the statute, and if other procedure was had in accordance with the statutes, the panel as it now stands is legally constituted.

As is mentioned above, it shall be the duty of the clerk of the court by July 9, 1951, to prepare and certify a true and complete list of all voters who voted in the last general election. In my opinion, a jury commission should make up, as soon as possible, a new jury list from the data supplied by the clerk. It is further my opinion that if, during your present term of court, it becomes necessary to call more jurors, in addition to your present panel, under § 30-119 or § 30-121, such names should be selected from this new jury list. To summarize, in my opinion, the **present panel** is legally constituted, but if **jurors in addition** to the present panel are needed, such jurors should be selected from the new list which will contain the names of women voters.

I hope that this opinion will prove helpful and that it will answer your questions on this matter.