

## **Opinion No. 65-39**

March 2, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

**TO:** Honorable Garnett R. Burks, District Judge, Seventh Judicial District, Socorro, New Mexico

### **QUESTION**

#### **QUESTIONS**

1. Can the judge of a judicial district comprised of two first class counties, one second class county, and one fifth class county legally pay the deputy clerk of the second class county any salary not in excess of the total amount specified for clerks and deputies of the district in Section 16-3-38, 1953 Compilation, New Mexico Statutes, as amended?
2. Can the judge of a judicial district comprised of four counties legally appoint a full-time court reporter at the salary specified in Section 16-3-46, 1953 Compilation, New Mexico Statutes, as amended, to serve as such in three counties, and also employ a part-time court reporter at the daily rate specified in said statute, to serve in one county?
3. May a district court judge employ a person who does parttime juvenile and probation work and also does part-time clerical work, and pay such employee from both the juvenile and district court funds according to the service rendered in each capacity?
4. May a district court employ a county official, such as county clerk, as a parttime juvenile officer and pay him from the juvenile funds?

#### **CONCLUSIONS**

1. See Analysis.
2. Yes.
3. See Analysis.
4. See Analysis.

### **OPINION**

{\*66} ANALYSIS

Section 16-3-38 N.M.S.A., 1953 Compilation (P.S.) sets the maximum salaries for district court clerks, deputy clerks and assistant clerks. Your specific question concerns a deputy clerk of a second class county. The controlling language of Section 16-3-38, supra, is in sub-section B and it reads:

". . . The total salaries for the clerk of the district court and for all deputies in the counties of the second, third, fourth and fifth classes, for which the clerk is appointed shall **not exceed the total maximums for all of the counties as fixed above.**" (Emphasis supplied.)

While this language is not as clear as it could be, it appears that the underscored language has reference to Section 16-3-38, subsection A, (1) (c), supra, and salary of a deputy clerk for a second class county may not exceed the maximum salary for a clerk of a second class county as set out therein. That maximum is \$ 3,720 per year. This interpretation makes all of the sections harmonious since the maximum salaries for deputy clerks in A, B, and C Class counties is limited to \$ 5,800 per year and in first class counties the limit is \$ 4,600 per year. We therefore conclude that a deputy clerk of a second class county and a county in which there is no clerk appointed may not receive salary in excess of \$ 3,720 per year.

It appears that there are only two statutory sections dealing with the appointment of court reporters. These are Section 16-3-44 N.M.S.A., 1953 Compilation and Section 16-3-46 N.M.S.A., 1953 Compilation (P.S.). There is nothing in either of these sections to indicate that you may not utilize the services of a part-time court reporter as you suggest in your second question. The only restriction found in either of these sections is that on the salary of a full-time court reporter. We therefore conclude that the answer to your second question is yes.

Both your third and fourth questions involve incompatibility of public employment and they will be considered together. In **Haymaker vs. State ex rel McCain**, 22 N.M. 400, the Supreme Court laid down the rule for testing the compatibility of public employment and that rule has since been the law of New Mexico. This test is set out at page 403:

"In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must subordinate, one to the other, and they must, per se, have the right to interfere with the other before they are incompatible. . . ."

We do not see that the jobs of probation officer and assistant district court clerk are incompatible within the test set forth in the **Haymaker case** quoted just above. Both of these positions fall under the direct control of the district court, not one under the other, so we therefore conclude that unless they are physically incompatible they may be performed by the same person and such person may be compensated from both the juvenile and district court funds according to the service rendered in each capacity. Since your question states that both of these jobs would be on a part-time basis, physical incompatibility would not appear to be a problem.

{\*67} The situation you pose in your fourth question is apt to be an incompatible one. The two positions, county clerk and juvenile officer do not appear to violate the test of **Haymaker**. On the other hand the two may be physically incompatible. A county clerk is a full time officer of the county and as such would be subject to the test for an incompatible job set out in Section 5-3-40 N.M.S.A., 1953 Compilation. This section reads as follows:

"Permanent abandonment of office, what constitutes. -- Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the state, other than service in the armed forces of the United States of America, for which a salary or compensation is authorized, or who shall accept private employment for compensation and who by reason of such other public office or employment or private employment shall fail for a period of thirty (30) successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment."

You will note that the test of this section is the failure by the official for thirty consecutive days to devote his time to the usual and normal extent, during ordinary working hours, to the duties of his office. Therefore whether or not a county clerk may perform the duties of a juvenile officer and be compensated therefore will depend on whether or not such clerk violates the test noted just above, and consequently we cannot give a simple yes or no answer to your fourth question.