

Opinion No. 76-35

September 23, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Andrea Buzzard, Assistant Attorney General

TO: David R. Gardner, Executive Secretary, Judicial Standards Commission, P. O. Box 4007, Albuquerque, New Mexico 87106

QUESTIONS

Question

Whether an official court reporter is a clerk, deputy or assistant within the meaning of Section 5-1-10, NMSA, 1953 Comp.

Conclusion

See Analysis.

OPINION

{*123} Analysis

Section 5-1-10, NMSA, 1953 Comp. provides:

NEPOTISM PROHIBITED -- EXCEPTIONS. -- It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any person related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment: Provided, that this act [5-1-10, 5-1-11] shall not apply where the compensation of such clerk, deputy or assistant shall be at the rate of \$ 600 or less a year, nor shall it apply to persons employed as teachers in the public schools.

A district court judge is charged with the duty of selecting an official court reporter to record the proceedings of his court. Section 16-3-7, NMSA, 1953 Comp. A small claims court judge has the power to appoint a court reporter for his court. Section 16-5-6, NMSA, 1953 Comp. The judicial department personnel plan regards court reporters at the district court level as "special employees." These "special employees" are directly responsible to the judge and appointed by him. The appointing authority of official court reporters is, therefore, by statute and rule, a judge. A judge is a public official either

elected or appointed. The question essentially is whether an official court reporter is a clerk, deputy or assistant to the judge who appoints him.

Initially, we note that judges, with the exception of magistrate court judges, are not required to be bonded. In Opinion of the Attorney General No. 5424, it is stated that, with respect to appointed public officials who were not required to give bond, Section 5-1-10, **supra**, absolutely prohibited appointments to the named positions within the prescribed degree of relationship. We see no reason to depart from this advice. See **State v. Stapleton**, 48 N.M. 463, 152 P.2d 877 (1944). The **Stapleton** case indicates that nepotism employment is valid only if the appointment is approved by the officer, board, council or commission whose duty it is to approve the bond of the party giving such employment or where the compensation to be paid such deputy, clerk or assistant is at the rate of \$ 600 or less per annum. The latter case concerned the appointment by a county assessor of his wife as deputy assessor.

The decisions involving antinepotism statutes are comparatively few in number. See Annotation, 88 A.L.R. 1103. Nepotism is defined in **Webster's Third New International Dictionary** as the showing of favoritism by reason of relationship rather than of merit. See **State ex rel. Robinson v. Keefe**, 111 Fla. 701, 149 So. 638 (1933). It has been held that antinepotism statutes are highly penal in character and, therefore, are to be strictly construed. **State ex rel. Robinson v. Keefe, supra; Baillie v. Town of Medley**, 262 So. 2d 693 (Fla. App. 2d 1972), **cause dismissed**, 279 So. 2d 881 (Fla. 1973). New Mexico's anti-nepotism statute is likewise highly penal in character. Section 5-1-11, NMSA, 1953 Comp. provides that a nepotism employee's employment is null and void, and the individual giving such employment shall be liable for any and all money so unlawfully paid out to such employee.

With these considerations in mind, we conclude that an official court reporter is not a clerk, deputy or assistant. A "clerk" is generally defined as one who is hired to do clerical work, such as bookkeeping, copying, transcribing, typing, writing, tabulation, and the like, without special executive qualifications and without being in charge of work of special importance. 14 C.J.S. 1205.

The word "deputy" means one appointed as the substitute of another, and empowered to act for him in his name or on his behalf. 26A C.J.S. 496. **Williams v. Ferrentino**, 199 So. 2d 504 (Fla. App. 2d 1967). There can be no deputy judges. **State v. Noble**, 118 Ind. 350, 21 N.E. 244 (1889); **Boss v. County of Saline**, 171 Neb. 538, 106 N.W. 2d 860 (1960).

The word "assistant" has been defined as meaning one who helps, aids, or assists; also, subordinate of one in an official position. 7 C.J.S. 14; **State ex rel. Dunn v. Ayers**, 112 Mont. 120, 113 P. 2d 785 (Mont. 1941). The **Ayers** case also noted that, as ordinarily used, an assistant is one who must look to his superior for authority to act. See Opinion of the Attorney General No. 5448.

The primary duty set forth by statute for an official court reporter is to record the proceedings of court and to make transcriptions of those proceedings. Section 16-3-7, **supra**. This duty is separate and apart from judicial duties required of a judge. Certain clerical and secretarial duties may be required of such court reporter. [See the job description of a court reporter contained in the judicial department personnel plan.] We do not think, however, that these related duties thereby characterize a court reporter as an assistant to the judge. A court reporter may be considered an assistant to the **court** to the effect that such employment {**125*} is properly made by the judicial branch of government. See **State v. Westfall**, 89 N. W. 175 (Minn. 1902). A judge, however, is not the court, although frequently the words are used interchangeably. **Ex Parte Lowrey**, 518 S. W. 2d 897 (Tex. Civ. App. 1975).

In addition, we note that no purpose would be served to apply the anti-nepotism statute of New Mexico to official court reporters. Individuals who qualify for such appointments are, of necessity, persons of merit. These individuals must be certified shorthand reporters in the State of New Mexico. See Rules Governing Court Reporters, §§ 16-12-1, **et seq.**, NMSA, 1953 Comp. (1975 P.S.).

Finally, we note that Cannon III of the Code of Judicial Conduct, Section 16-11-3, NMSA, 1953 Comp. (1975 P.S.), which cautions a judge to exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism, does not, in the commentary to such cannon, include a court reporter among the appointees with respect to whom a judge should avoid nepotism.

Based upon the foregoing, we conclude that an official court reporter is not a clerk, deputy or assistant as those terms are used in Section 5-1-10, **supra**.