

**Opinion No. 43-4365**

August 13, 1943

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Honorable C. R. Sebastian, State Comptroller, Santa Fe, New Mexico

In your letter dated August 10, 1943, you inclose a letter from a county clerk to you in which said clerk has been acting as Probate Judge under the provisions of Section 16-415 of the 1941 Compilation, and the clerk wishes to know whether she may draw the salary of the Probate Judge in addition to her regular salary as county clerk. Section 16-415 of the 1941 Compilation provides as follows:

"When a vacancy occurs in the office of judge of probate, in any county by death or physical incapacity, the clerk of the probate court shall notify the county commissioners of such vacancy, who shall fill the vacancy in the manner prescribed by law; and the clerk, from the time such vacancy takes place, shall act as judge of probate until the person selected be appointed and qualified."

Under this section it is the duty of the county clerk to act as Probate Judge when the office is temporarily vacant due to the death or physical incapacity of the Probate Judge.

Under Article 10, Section 1 of the Constitution it is provided that no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law.

In view of this constitutional provision and the fact that acting as Probate Judge in certain instances is one of the duties of the county clerk, I am of the opinion that the county clerk may not legally draw any additional salary for acting as Probate Judge under the provisions of Section 16-415 above mentioned.

By C. C. McCULLOH,

First Asst. Atty. General