

**Opinion No. 43-4406**

November 10, 1943

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

**TO:** Mr. Robert W. Reidy, Assistant District Attorney, Albuquerque, New Mexico

I have your letter of November 9, 1943, wherein you state that the Probate Judge of Bernalillo County refuses to hold court in the space provided for him in the courthouse by the County Commissioners and insists on maintaining his office in his private residence, which is the distance of about 3 blocks from the courthouse. In view of this fact situation you request an opinion on the following 2 questions:

1. "Are the acts of the Probate Judge legal and binding although they are held in a court which does not meet in the county court house, in the space allotted by the County Commissioners.
2. "Is the Probate Judge required to take the office which the County Commissioners provide for him, if it be a suitable office, and is it the duty of the Clerk of the Probate Court to have her records available at the times and places when the Probate Judge requires them."

I call your attention to Section 16-405, New Mexico 1941 Compilation, which provides:

"The probate judges of this state are strictly required to hold their courts in the county seats of their counties, and the probate clerks shall also have their offices in the said county seat of the county at all times."

Section 16-406, New Mexico 1941 Compilation, provides:

"For every neglect on the part of any probate judge, or clerk of any probate court of the state, in the discharge of their duties as prescribed in the previous section, the one so failing, upon conviction thereof in the district court, shall be fined in a sum not exceeding five thousand dollars (\$ 5,000)."

Section 16-407, New Mexico 1941 Compilation, provides:

"The county commissioners of each county in this state shall provide a suitable office for the accommodation of the probate judge of the county, and shall furnish all stationery, and such other things as may be necessary for the prompt discharge of the duties of said judges."

Section 16-408, New Mexico 1941 Compilation, provides:

"The archives of said offices shall be under the charge of the clerks of said probate courts, and said clerks are prohibited from taking from said offices any document or book pertaining to said offices beyond six (6) miles from said offices."

It is noted that while the Probate Judges are strictly required to hold their courts in the county seats of their counties and a specific penalty is provided for failure to do so, no provision of our statutes requires them to hold their courts in the courthouse, nor are they required to use such office space as may be furnished by the County Commissioners, which, however, they have a right to demand if they should see fit.

It is, therefore, my opinion that the Probate Judges must hold their courts within their county seats, but not necessarily within the courthouse or within space furnished by the County Commissioners, since our statute only requires that the Probate Judge's office be within the county seat. They must, however, keep their offices open in compliance with Sections 16-101 and 16-409 of the New Mexico 1941 Compilation.

Section 16-408, as above set out, answers your question concerning whether the clerk of the Probate Court may take her records from her office to the Probate Judge's office, so long as such distance is not more than 6 miles, and since you specifically set out only 3 blocks are involved, this limitation is immaterial to the question which you have submitted. Further, since the Probate Judge is legally maintaining his court and offices at 615 West Copper Ave., the clerk, of course, has the same duty to furnish the Judge with necessary records as she did when the Judge maintained his court at the courthouse. It is noted that there is not even a requirement for the County Commissioners to furnish the Probate Judge office space in the courthouse.

By HARRY L. BIGBEE,

Assistant Attorney General