

Opinion No. 66-71

June 3, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Paul J. Lacy, Assistant Attorney General

TO: Mr. Louis R. Lopez, Administrative Assistant to Court Administrator, Supreme Court Building, Santa Fe, New Mexico

QUESTION

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1. In initiating action on attachment or garnishment proceedings before judgment where service of process on both the garnishee and the defendant is necessitated, is the constable entitled to service fees on both services?
2. What is the legal fee to be paid a constable on service of a warrant in a criminal cause?

CONCLUSIONS

1. See Analysis.
2. \$ 1.00.

OPINION

{*88} ANALYSIS

Initially, we would point out that the Writ of Garnishment and its service are governed by Sections 26-2-13 and 26-2-14 New Mexico Statutes Annotated, 1953 Compilation. Section 26-2-14 provides as follows:

"The said writ of garnishment shall be served by delivering a copy thereof together with a copy of the interrogatories as may be exhibited by the plaintiff, if any, to the garnishee, and the officer serving the same shall make return thereof as in case of ordinary summons. In case the sheriff is a garnishee the clerk issuing the writ shall appoint some person over the age of twenty-one years to serve the same, to whom the same shall be addressed, and such appointment shall be endorsed on the writ with the reasons therefor, signed by the clerk."

In the case of **Mendoza v. Acme Transfer and Storage Company**, 66 N.M. 32, 340 P.2d 1080 (1959), our Supreme Court held that Section 26-2-14, supra, required service of a Writ of Garnishment by the Sheriff except in cases where the Writ was to be served

upon the Sheriff himself. Under Section 26-2-35, New Mexico Statutes Annotated, 1953 Compilation, Justices of the Peace may also issue Writs of Garnishment in all cases within their jurisdiction. Section 26-2-35, supra, provides as follows:

"This article shall apply to proceedings in justice of the peace courts insofar as it is applicable; and the justice of the peace shall issue writs of garnishment in all cases within his jurisdiction, where, by this article, the clerks of the district courts may do so; **and such writs and other process shall be served a summons, in the manner provided herein.** " (Emphasis supplied.)

We are of the opinion that the words "and such writs and other process shall be served by the proper officer for serving a summons, in the manner provided herein" are words of limitation which operate to prevent anyone but a sheriff or his deputies from serving Writs of Garnishment, with the exception that anyone over the age of twenty-one may serve a Writ of Garnishment when the sheriff himself is to be served. We are also of the opinion that such limitation does **not** apply to a Writ of Attachment and therefore a constable may serve a Writ of Attachment.

With these facts in mind, and assuming a constable is serving a Writ of Garnishment on a sheriff, or is serving a Writ of Attachment, we proceed to answer your questions by referring to Section 36-19-3, New Mexico Statutes Annotated, 1953 Compilation, which provides the following:

"Constables shall hereafter be allowed to demand and receive the following fees, to wit: The {*89} same fees as are allowed by law for service of process and mileage by sheriffs.

No fees other than those herein provided for shall be charged or collected."

Section 15-40-18, New Mexico Statutes Annotated, 1953 Compilation (P.S.), lists in detail the fees which may be charged by sheriffs. That section says in part that a sheriff "shall be allowed the following fees and compensations, to wit: For serving **every** writ, citation, order, subpoena or summons, \$ 2.00; for **every** writ of capias or attachment for each defendant, \$ 2.00." (Emphasis supplied.) Therefore, where a sheriff serves two writs he should receive two fees, and since a sheriff is entitled to two fees, a constable who performs the same services is entitled to the same fees.

Reading down Section 15-40-18, supra, we find that a sheriff is entitled to \$ 1.00 "for serving each writ in a criminal case for each defendant". Again, because a sheriff is entitled to \$ 1.00 for serving criminal writs, a constable is entitled to the same fee.