

Opinion No. 91-09

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OPINION OF: TOM UDALL, Attorney General

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TO: Samuel W. Jones, Executive Director, Judicial Standards Commission, 2539 Wyoming N.E. -- Suite A, Albuquerque, New Mexico 87112

QUESTIONS

1. May a judge accept a gratuity in connection with the performance of a marriage ceremony?
2. May a judge solemnize a contract of matrimony outside his territorial jurisdiction?

CONCLUSIONS

1. Except for municipal judges, a judge may not accept a gratuity in connection with the performance of a marriage ceremony without violating the New Mexico Constitution.
2. Except for probate and municipal judges, judges and justices may solemnize marriages anywhere in New Mexico.

ANALYSIS

1. Gratuities For Performing Marriages.

By statute, judges authorized to solemnize contracts of matrimony may not charge a fee for their services. NMSA 1978, §§ 35-3-2 (Cum. Supp. 1990), 40-1-2(C) (Repl. Pamp. 1989). According to a previous Attorney General opinion, however, these statutes do not prohibit judges from accepting sums voluntarily given to them by the parties as a gift. 1929-30 AG Op. 40. Further, New Mexico's Code of Judicial Conduct provides that "no judge may ask for any remuneration for performing a marriage ceremony, but may receive an unsolicited gratuity for performing a marriage outside normal business hours." SCRA 1986, 21-500(D)(6).¹

Despite this authority, we believe that two provisions of the New Mexico Constitution prohibit most judges from accepting gratuities for solemnizing contracts of matrimony. Under Article XX, Section 9, "[n]o officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office, in any form whatever, except the salary provided by law." Article X, Section 1 provides that "no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law." These provisions do not

merely prohibit a judge from charging fees for his services; they prohibit a judge from **accepting** or **receiving** additional compensation. One Attorney General opinion has construed Article X, Section 1 to preclude a county clerk from accepting gratuities for issuing marriage licenses after hours because the activity was attributable to the clerk's public office. AG Op. No. 5665 (1953). Similarly, the authority to perform marriage ceremonies results from holding judicial office, and if a judge is either a state or county officer, the judge may not, consistent with the constitution, accept unsolicited gratuities for exercising that authority.

Essentially, a public office is created by law or the constitution and has duties imposed by law involving the exercise of some portion of sovereign power. *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 58 P.2d 1197 (1936); *Pollack v. Montoya*, 55 N.M. 390, 392, 234 P.2d 336 (1951). The judicial power of the state is vested in the courts established by the constitution and the legislature. N.M. Const. art. IV, § 1. Thus, judges of those courts have been delegated duties involving the exercise of sovereign power and are officers for purposes of the constitutional provisions governing officers' compensation. See also N.M. Const. art. VI (references to justices and judges holding office).

In addition, most judges qualify as either state or county officers. In *State ex rel. Ward v. Romero*, 17 N.M. 88, 125 P. 617 (1912), the New Mexico Supreme Court rejected the argument that a district attorney was a district officer rather than a state officer subject to Article XX, Section 9. The court found that the framers of the constitution did not intend to create a class of district officers separate from other state officers, but merely intended to describe the territorial limits of the official duty of certain state officers. 17 N.M. at 92. To support its conclusion, the court considered whether the duties of a district attorney "concern the State at large and are not limited to the particular district for which they have been elected." *Id.* at 92. The court also relied on cases from other jurisdictions which distinguished state from local officers based on whether their duties were exclusively of a local, rather than general, character. In addition, the court acknowledged the role of legislative intent:

[w]e do not desire to be understood as holding that the constitutional convention intended to include within the designation of "State officers," all the peace officers of the State, or even judges of probate courts...because by common understanding of the people...and by reason of prior legislative enactments and classification, many of these officials were evidently considered and dealt with as purely local officers....

Id. at 97.

Based on the considerations identified in *State ex rel. Ward v. Romero*, we believe that Supreme Court justices, Court of Appeals judges and district judges are state officers. Appellate judges exercise their authority statewide and are not confined to a particular locality. The New Mexico Supreme Court has expressly stated that district judges are state officers for the same reasons applicable to district attorneys. *Perea v. Board of Torrance County Comm'rs*, 77 N.M. 543, 546, 425 P.2d 308 (1967).

Magistrate and metropolitan judges also are state officers. The state constitution authorizes the legislature "to establish a magistrate court to exercise limited original jurisdiction as may be provided by law. The magistrate court shall be composed of such districts and elective magistrates as may be provided by law." N.M. Const. art. VI, § 26. Thus, the constitution provides for the creation of one magistrate court for the state, divided into districts. The legislation implementing the constitutional provision for magistrate courts provides for one magistrate district or metropolitan court district in each county. NMSA 1978, § 34-8A-1 (Repl. Pamp. 1990), § 35-1-2 (Repl. Pamp. 1988). See also NMSA 1978, § 34-8A-2 (Repl. Pamp. 1990) (the metropolitan court shall constitute a state magistrate court). Although each magistrate district is coextensive with a county, the legislature provided that the magistrate court is:

a court of limited original jurisdiction within the judicial department of the state government. Personnel of the magistrate court are subject to all laws and regulations applicable to other state offices and agencies and to other state officers and employees except where otherwise provided by law.

NMSA 1978, § 35-1-1 (Repl. Pamp. 1988). This clearly shows that magistrate and metropolitan judges are considered state, rather than local, officers.

As indicated in *State ex rel. Ward v. Romero*, probate judges are considered local officers. Unlike the magistrate court, the constitution does not establish one probate court for the state, but provides that "[a] probate court is hereby established for each county." Salaries for probate judges are included by the legislature among those for other elected county officials. NMSA 1978, §§ 4-44-4 to -8 (Cum. Supp. 1990). It appears that the board of county commissioners is authorized to fill vacancies in the office of probate judge. NMSA 1978, § 10-3-3 (Repl. Pamp. 1990); AG Op. No. 1480 (1936). Probate judges are not included in the state's judicial and magistrate retirement plans. See NMSA 1978, §§ 10-12-1 to -18; 10-12A-1 to -13 (Repl. Pamp. 1990). Based on these factors, we believe probate judges are properly characterized as county officers.

The only judges who are not state or county officers are municipal judges. Municipal courts are not established by the constitution, but are created by the legislature pursuant to constitutional authority. See N.M. Const. art. VI, § 1 (judicial power of the state vested in named courts and "such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state"). A municipal court is established in each municipality, with certain exceptions. NMSA 1978, § 35-14-1 (Repl. Pamp. 1988). The authority of a municipal court is limited to offenses and complaints under municipal ordinances, the qualifications and salary of municipal judges are provided by municipal ordinance, the judges are elected at regular municipal elections and vacancies are filled by appointment by the municipality's governing body. *Id.* §§ 35-14-2(A), 35-14-3, 35-14-4, 35-14-5(C). See also NMSA 1978, § 3-10-1 (Repl. Pamp. 1985) (including municipal judges among the designated elective officers of a municipality). These statutes limit the powers of municipal judges to the municipality in which they sit and they rule on matters primarily of local concern. Thus,

municipal judges are properly classified as municipal officers, rather than as state or county officers.

As municipal officers, municipal judges are the only judges in the state not subject to the constitutional limitations on compensation applicable to state and county officers.² Accordingly, as authorized by statute and the Code of Judicial Conduct, they may accept, but not ask for a gratuity for performing a marriage ceremony. All other justices and judges are prevented from accepting such gratuities by Article X, Section 1 or Article XX, Section 9 of the New Mexico Constitution.

2. Jurisdiction to Solemnize Marriages.

The New Mexico legislature has provided that "[j]udges, justices and magistrates of any of the courts established by the constitution of New Mexico and laws of the state are civil magistrates having authority to solemnize contracts of matrimony." NMSA 1978, § 40-1-2(B) (Repl. Pamp. 1989). Magistrates also have specific statutory authority to solemnize the contract of matrimony. Id. § 35-3-2 (Cum. Supp. 1990).

Supreme Court justices, appellate judges and district court judges may perform marriages anywhere in the state. Justices and judges of the appellate courts have statewide jurisdiction on all matters, NMSA 1978, §§ 34-5-8, 34-5-14 (Repl. Pamp. 1990). District court judges, under the New Mexico Constitution, "have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts...." N.M. Const. art. VI, § 13. Thus, except as to appellate jurisdiction over inferior tribunals, this constitutional provision does not limit the jurisdiction of the district court to any particular territory. *Peisker v. Chavez*, 46 N.M. 159, 164, 123 P.2d 726 (1942).³

As to magistrate and municipal judges, in 1988 this office issued an opinion concluding that, on the basis of statutes limiting their authority to particular geographic locations, they could not perform marriage ceremonies outside their territorial jurisdictions. AG Op. No. 88-36 (1988). Apparently in response to this opinion, the legislature amended Section 35-3-2 to provide that magistrates could solemnize marriages "throughout the state." 1989 N.M. Laws, ch. 160, § 1 (codified at NMSA 1978, § 35-3-2 (Cum. Supp. 1990)). Metropolitan courts have the "jurisdiction provided by law for magistrate courts," NMSA 1978, § 34-8A-3(A) (Repl. Pamp. 1990), and metropolitan court judges are therefore now permitted to perform marriages throughout the state. Probate and municipal judges, however, do not have the authority to perform marriages outside their designated territories. See N.M. Const. art. VI, § 23 (empowering the legislature to confer upon a probate court "general civil jurisdiction coextensive with the county"); NMSA 1978, § 35-14-2(A) (Repl. Pamp. 1988) (limiting a municipal court's jurisdiction to "offenses and complaints under ordinances of the municipality").

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GENERAL FOOTNOTES

[n1](#) Before it was amended in 1989, Rule 21-500(D)(6) prohibited judges from asking for **or** receiving any remuneration for performing a marriage ceremony.

[n2](#) By statute, "[a]ny mayor or member of the governing body of a municipality who receives payment for services rendered by him, contrary to law, is guilty of a misdemeanor." NMSA 1978, § 3-10-6 (Repl. Pamp. 1985). The prohibition has not been extended to municipal judges, although they, like mayors and governing body members, are classified as municipal officers, **Id.** § 3-10-1.

[n3](#) The constitution effectively limits the ability of district court judges to exercise their non-matrimonial authority statewide by permitting them to "hold court" outside their districts only at the request of another district judge or if designated by a supreme court justice. N.M. Const. art. VI, § 15.