

OPINION NO. 73-091

Syllabus:

1. A deputy clerk of courts functions in an official capacity only during such hours as are determined by either the court which he serves or the clerk of courts.

2. A deputy clerk of courts is not required by R.C. 147.02 to charge for notary work; however, if such notary work is involved in the performance of one of his official duties specified in R.C. 2303.20, the statutory fee must be charged.

3. A deputy clerk of courts is entitled to retain the fee charged for his personal services as a notary, when such services are performed after normal working hours.

To: David A. Cutright, Ross County Pros. Atty., Chillicothe, Ohio
By: William J. Brown, Attorney General, September 7, 1973

I have before me your request for my opinion, which reads as follows

I have received an inquiry from the Office of the Ross County Clerk of Courts as to the position of Deputy Clerks who are also Notaries Public. Therefore, I direct the following questions to you:

1. Are Deputy Clerks in the Office of Clerk of Courts considered as acting Deputy Clerks for twenty-four hours a day?

2. Must Deputy Clerks employed in the Office of Clerk of Courts charge for notary work?

3. Must money received by a Deputy Clerk of Courts for notary work be turned in to the County Treasury when such work is done after normal working hours?

Each of the Deputy Clerks paid for their commission and equipment out of their own funds.

In response to your first question, I have found no statutory provision which specifies the working hours of the clerk of courts. See Backett v. Hibbee, 4 Ohio App. 2d 246 (1965). However, a clerk of courts is under the direction of the court which he serves. R.C. 2303.26. Since a Deputy clerk of courts, when so qualified, may perform the duties appertaining to the office of clerk of courts, he, too, is subject to the direction of the court. R.C. 3.06 (A). Thus, a clerk of courts and his deputies act in an official capacity to the extent that the court directs.

A clerk of courts also has the right to adopt reasonable rules, if not inconsistent with statute, for the transaction of business. See Chinn v. Brown, 20 Ohio N.P.(r.s.) 223 (1916). A reasonable rule facilitating the transaction of business necessarily may be adopted concerning office hours. Such office hours become significant when a determination must be made as to the legal sufficiency of the filing of papers which are required by statute to be filed in the office of the clerk of courts. Only while the office of the clerk of courts is open for business can a paper which is required to be filed in such office be filed with any legal sufficiency. The court in

Taylor v. Wallace, 7 Ohio Dec. Reprint 328, aff'd. 31 Ohio St. 151 (1877), stated at p. 329 as follows:

To enter a notice of appeal with the clerk requires that the notice should be left at the office of the clerk, with the clerk himself, or his deputy, for entry. This is the natural force of the words: "enter with the clerk." The notice is not to the clerk personally, and therefore, does not depend upon his acceptance at some other place than his office. It is a notice to whom it may concern, a public notice, and therefore the place must be public not the private residence of the clerk, but his office.

See also Kienborth v. Bernard, 7 Ohio Dec. Reprint 359 (1877).

However, there is no statutory authority which prohibits the office of clerk of courts from remaining open for business twenty-four hours per day. My predecessor in Opinion No. 2170, Opinions of the Attorney General for 1961, recognized that the functions of the office of the clerk of courts may be performed around the clock. He advised in that Opinion that a board of county commissioners could appoint a deputy clerk or clerks of a county court, and fix their compensation, in answering a question which stated that the deputy clerk would "take bond from persons who are being charged with a misdemeanor while the regular clerk is off duty, largely at night" (p.217). While the Opinion concerned a clerk of a county court, the instant fact situation is analogous.

A deputy clerk of courts is appointed by the clerk of courts who determines the duties of the deputy clerk. Since there is no statutory requirement concerning the hours which a deputy clerk of courts shall work, I must conclude that such deputy functions in an official capacity only during such hours as determined by either the court or the clerk of courts.

Your second question is whether a deputy clerk of courts who is employed in the office of the clerk of courts must charge for notary work. R.C. 147.08 provides that a notary public is entitled to the stipulated fees, but there is no provision mandating that a notary charge those fees. However, a deputy clerk of courts who, pursuant to his position, takes acknowledgements and performs other activities which a notary public is also authorized to perform is required by statute to charge for those services and deposit such monies received in the county treasury. R.C. 325.27 and 325.31. R.C. 2303.20 enumerates the

fees which must be collected by the clerk of courts for performing certain specified services, whether such services are performed by the clerk or by his deputies. Thus a deputy clerk of courts is not required by G.C. 147.08 to charge for notary work; however, if such notary work is involved in the performance of one of the services specified in G.C. 2303.20, the statutory fee must be charged.

Your final question asks whether a deputy clerk of courts is required to deposit in the county treasury money received for notary work performed after normal working hours. My predecessor dealt with an analogous situation arising in the office of the probate court in Opinion No. 2073, Opinions of the Attorney General for 1938. He stated at p. 1625 as follows:

In the case of a deputy who serves as a Notary, if his right to take acknowledgements comes by virtue of his being a deputy of the Court, then his service is an official one whether performed during or after office hours and he would be bound under Section 2977 and 2978, General Code, to pay all such fees into the County Treasury. However, if his power to act as a Notary comes from a Notary Commission for which he has qualified as a private person and which he has received as such, the situation changes and as long as he performs his notarial duties after office hours, he is entitled to retain the fee charged for his personal services as a notary.

It cannot be disputed that an officer is not required to pay over to the county treasury, money received by him in payment for services performed for another by private agreement, where such services are no part of the duties of his office and are not incompatible with or included within his official duties.

If a notary public, who also holds the position of deputy clerk of courts, performs after-hours work for which he is entitled to compensation, he is not precluded by statute from receiving such compensation. If such notary services are not part of his duties as a deputy clerk of courts, he would not be charging for performing an official duty. See also Opinion No. 3054, Opinions of the Attorney General for 1941.

My predecessor, in an analogous situation, held that the clerk of a city court could charge fees for providing notary services which he was not required in his official capacity to perform. He stated, in Opinions of the Attorney General for 1909, page 232, at 240, as follows:

If the clerk of the city court has also taken out a commission as a notary public and administers an oath to some person or takes an acknowledgement of some person with reference

to some paper the same as any outside notary right do, the acknowledgement of oath not being one which he is required to administer as clerk of the court in the proceedings there pending, the clerk is entitled to that fee for his own use as a notary public, and it does not belong to the city.

If, however, a deputy clerk of courts is hired specifically because he is a notary, i.e., his commission is a prerequisite of his employment, he is precluded from charging for such notary services during office hours. In Opinion No. 133, Opinions of the Attorney General for 1963, the syllabus reads as follows:

An employee of a prosecuting attorney cannot be compensated by the payment of notary fees, not taxed as court costs, for notarial services rendered in the regular course of employment.

Based on the foregoing discussion I must conclude that a deputy clerk of courts is entitled to retain the fee charged for his personal services as a notary, rendered after working hours, so long as such services are not part of the official duties of his office.

In specific answer to your questions, it is my opinion and you are so advised, that:

1. A deputy clerk of courts functions in an official capacity only during such hours as are determined by either the court which he serves or the clerk of courts.
2. A deputy clerk of courts is not required by R.C. 147.08 to charge for notary work; however, if such notary work is involved in the performance of one of his official duties specified in R.C. 2303.20, the statutory fee must be charged.
3. A deputy clerk of courts is entitled to retain the fee charged for his personal services as a notary, when such services are performed after normal working hours.