

PROSECUTING ATTORNEY: Not entitled to fee from person receiving
SCHOOLS: school fund loan for examination of abstract.

September 2, 1941

Honorable Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri



Dear Sir:

This will acknowledge receipt of your letter of August 20, requesting an official opinion, and which reads as follows:

"I would like to have your opinion concerning the making of a charge for the examination of an abstract where a school fund loan is made. I feel sure that you have heretofore rendered an opinion on this subject and can send me a copy of same.

"It has been the practice for the Prosecuting Attorney to charge the land owner a fee for examining the abstract where the County makes a loan. The fee in no wise is charged against the County.

"I would like to know whether or not this practice should be continued and whether as a matter of policy, it is common practice for Prosecuting Attorneys to do so."

We are enclosing a copy of an opinion rendered by this Department under date of February 19, 1935 to the Honorable W. D. Griffin, Barton County, Missouri,

wherein we held that the Prosecuting Attorney was entitled to no fee from the county for examining abstracts for school fund loans.

The law providing for the county court to make loans from school funds is set out in the enclosed opinion. It requires the county court to secure the loan by a mortgage on real estate, clear of all liens and encumbrances, and the abstract of title to such real estate shall be filed with the county court.

It is the duty of the county Prosecuting Attorney to represent the county court relative to all legal matters, give his opinion, without fee, regarding the law in all matters in which the county is interested. Certainly, the county court should require the county Prosecuting Attorney to examine such abstracts of title for any defects therein. Such loans from school funds should never be made until a thorough examination of the abstract has been made by the Prosecuting Attorney and he has certified said abstract conveys good title to said real estate and same is clear of all liens and encumbrances.

Rule 35, subdivision 6 of the Supreme Court Rules prohibits any lawyer from representing conflicting interests and forbids the accepting of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a lawyer represents conflicting interests, when, in behalf of one client,

it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed."

To represent a person requesting a loan would be in effect acting in a dual capacity. The time may come when it will be necessary that certain litigation regarding this abstract of title may be instituted wherein the county may be an interested party. In such case the county Prosecuting Attorney could not represent both parties.

The charging of a fee by the Prosecuting Attorney for the examination of an abstract of title to real estate to secure a loan from school funds is almost analogous to an officer holding two offices which are incompatible, and which is prohibited under the law. In State ex rel. McAllister v. Dunn, 277 Mo., 38, l.c. 44, the court said:

"It is a well settled rule that the Legislature is not to be held to have done a vain and useless thing. It is elementary law that one may not hold two offices the duties of which are incompatible. What greater incompatibility could be conceived than the duty of paying and the duty of receiving and granting acquittance for public money? If one person could be both collector and treasurer, he would pay over the money as collector and receive it as treasurer, and, as treasurer, issue a receipt to himself, as collector. Under the general law it is settled no man could have held these two positions. * * * * *"

Hon. Marshall Craig

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There is definitely no statutory provision prescribing a fee for such services. Therefore, it is the opinion of this Department that a Prosecuting Attorney cannot charge a person receiving a school fund loan a fee for the examination of an abstract of title, neither should he examine said abstract for said person since such service would be incompatible with his official duties.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

ARH: EAW