OATH: (Not necessary to uplift hand to swear
(or to make an affidavit
AFFIDAVIT: (Essential requirements of oath.

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March 20, 1935

Honorable Elliott M. Dampf
Prosecuting Attorney Cole County
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of March 8, in which you request the opinion of this department upon the question therein submitted. Your letter is as follows:

> "Will you kindly give me your opinion as to whether it is necessary for a person to lift his hand and make oath to a statement before he can be prosecuted for making a false affidavit, or if it is merely necessary that he sign said affidavit in the presence of the notary public. The late cases in point are 330 Mo. 1195 lc and 327 Mo. 1199 lc."

Your question is, "whether it is necessary for a person to lift his hand and make oath to a statement before he can be prosecuted", and we presume you have reference to a prosecution under Section 3882 R. S. Mo. 1929, which is as follows:

> "Every person who shall willfully, corruptly and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor, and shall upon conviction be punished by imprisonment in the county jail not less

than six months, or by fine not less than five hundred dollars."

In the case of State v. Privitt 327 Mo. 1194, l. c. 1199, the Supreme Court said the following:

"As is said in 48 Corpus Juris,855, to constitute a valid oath there must be, in the presence of a person authorized to administer it, an unequivocal act by which affiant consciously takes upon himself the obligation of an oath. This declaration of Corpus Juris is a paraphrase of words used by the New York Court of Appeals in the case of O'Reilly v. People, 86 N. Y. 154, 40 Am. R. 525, 10 Abb.N. Cas. 53, in which it was held that the mere delivery of an affidavit, signed by the person presenting it to the officer for his certificate, without more, is not such an act as to constitute an oath. It is true that, by uniform decisions of our courts and by our statutes, no set formula is required to constitute an oath or to impose the obligation of an oath. Our statute, Section 1722, Revised Statutes 1929, provides that:

'In all cases in which an oath or affirmation is required or authorized by law, every person swearing, affirming or declaring, in whatever form, shall be deemed to have been lawfully sworn, and to be guilty of perjury for corruptly and falsely swearing, affirming or declaring, in the same manner as if he had sworn by laying his hand on the gospels and kissing them.'

But the statute itself clearly implies some form of oath or affirmation, some unequivocal act by which the affiant takes upon himself the obligation of an oath. * * * * *.

To the same effect as our statute, we read in 2 Corpus Juris, 337, that:
'Either oath or affirmation is sufficient. In fact no particular ceremony

> is necessary and it is only required that something be done in the presence of the officer which is understood by both the officer and the affiant to constitute the act of swearing.' "

And the Missouri Supreme Court, in State v. Tull 62 S. W. (2nd) 389, l. c. 391, said the following:

> "In the Privitt Case we said that 'by uniform decisions of our courts and by our statutes, no set formula is required to constitute an oath or to impose the obligation of an oath';and, quoting from 2 Corpus Juris, p.338, sec.49: '* * * No particular ceremony is necessary and it is only required that something be done in the presence of the officer which is understood by both the officer and the affiant to constitute the act of swearing.' There must be some unequivocal act by which the affiant consciously takes upon himself the obligation of an oath. 48 C. J. p. 855,sec.77,and see cases in note. But it need not be evidenced by any set formula. The Minnesota Supreme Court said: 'The particular formality with which an oath is administered has never been regarded in this state as of great importance. The essential thing is that the party taking the oath shall go through some declaration,or formality, before the officer which indicates to him that the applicant consciously asserts or affirms the truth of the fact to which he gives testimony.' * * * * * *"

A very clear and concise statement of the law of the necessary requirements in taking an oath is set forth in the case of McCain et al. v. Bonner 122 Ga. 842, l. c. 846, 51 S.E. 36, l. c. 38,

> "The mere handing to an officer authorized to administer oaths of an affidavit previously signed by one who is recited therein

as having been duly sworn,and in whose presence the officer signed the jurat without administering a formal oath,has been held not to amount to the administration of an oath. O'Reilly v. People, 86 N.Y.154, 40 Am.Rep. 525. In a transaction of this character there is no unequivocal and present declaration or act on the part of the affiant by which he consciously takes upon himself the obligation of an oath. If, however, the affiant, at the time of tendering the affidavit to the officer, uses language signifying that he consciously takes upon himself the obligation of an oath, and the officer so understands, and immediately signs the jurat,this will amount to such a concurrence of act and intention as will constitute a legal swearing. The acts of the officer and of the affiant must be concurrent,and must conclusively indicate that it was the purpose of the one to administer and the other to take the oath, in order to make a valid affidavit. When an affiant presents to the officer an affidavit previously signed by him, with the statement that he is familiar with its contents, that what is therein contained is true,and that he swears to the same, and the officer immediately, on the faith of such declaration,affixes his official signature to the jurat, this conduct would not only indicate that the affiant understood he was taking an oath, but also that the officer likewise so understood, and, by presently signing the jurat, evidenced his intention to administer an oath. It is not necessary that the oath administered should be formal. What the law requires is that 'there must be, in the presence of the officer, something done whereby the person to be bound consciously takes upon himself the obligation of an oath.' 2 Bish. Cr.Law, sec.1018. 'It is not essential * * * that affiant should hold up his hand and swear, in order to make his act an oath, but it is sufficient if both affiant and the officer understand that what is done is all that is necessary to complete the act of swearing."

And in the case of State v. Ruskin, 56 A. L. R. 403, 159 N. E. 568, quoting from 21 Ruling Case Law 257, the court said the following:

> "21 R. C. L. 257: 'To make a valid oath on the falsity of which perjury may be charged there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes on himself the obligation of an oath. The underlying principle evidently is that whenever the attention of the person who comes up to swear is called to the fact that the statement is not a mere asseveration, but must be sworn to, and in recognition of this he is asked to do some corporal act, and does it, this is a statement under oath - and this, without kissing any book, or raising his hand, or doing any religious act.' Ram v. King 51 Can. S. C. 392, 26 D. L. R. 267, Ann. Cas.1916A 494; Curry v. Rex, 48 Can. S. C. 532, 15 D. L.R. 347, Ann. Cas. 1914B, 591; State v. Day, 108 Minn. 121, 121 N. W. 611; 85 Am. Dec. 489, note; Cronk v. People, 131 Ill. 56, 22 N. E. 862."

CONCLUSION

It is, therefore, the opinion of this department that no particular form of administering an oath is necessary under the laws of Missouri, whereby one may be prosecuted for making a false affidavit, but there must be, in the presence of the officer, something done whereby the person to be bound consciously takes upon himself the obligation of an oath, and it is not absolutely essential that the affiant lift his hand. However, the

uplifting of the hand is formal enough to make an oath legal and binding.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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