

INSANE:

Prosecuting attorneys of the county containing a population of less than one hundred thousand cannot be appointed by the county court to represent insane persons in an insanity hearing.

December 28, 1937

Mr. Alvin H. Juergensmeyer,
Prosecuting Attorney,
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Warrenton, Mo.



Dear Sir:

This will acknowledge receipt of your letter requesting an official opinion under date of December 22, 1937, which reads as follows:

"At the last session of the Legislature a law was passed requiring that the County Court, on insane hearings, appoint an attorney to represent the insane person at the hearing - provided they do not have an attorney.

Can the County Court appoint the prosecuting attorney to represent the presumed insane person at the hearing, and if so, would the prosecuting attorney be entitled to additional pay?"

Section 11364 R.S. Mo. 1929 provides as follows:

"The county courts of all counties in this state containing one hundred thousand inhabitants or more, according to the last decennial census of the United States, and of all such counties as may hereafter contain one hundred thousand inhabitants or more, may, in their discretion, appoint and commission as other officers are commissioned by the county court a county counselor, who shall be a person learned in the law, at least twenty-five years of age, and who shall hold his office for two years, and until his successor is appointed, commissioned and qualified: Provided, that in all counties containing

less than one hundred thousand inhabitants the office of county counselor is hereby abolished."

According to the last census, which was 1930, Warren County only had a population of eighty thousand eighty two and according to Section 11364, as set out above, could not have a county counselor.

Section 11318 R.S. Mo. 1929, in reference to the duties of a prosecuting attorney, provides as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: *****."

Under Section 8646 of the 1937 Session Laws of Missouri, page 511, this section provides:

"At the time appointed, unless the investigation shall be adjourned over to some other time, the court shall cause the witnesses in attendance to be examined before themselves, or a jury, if one be ordered for the purpose, duly chosen and impaneled, according to the practice of the court. At least one of the witnesses examined shall be a reputable physician. If no licensed attorney appears for the alleged insane person at such hearing, the court shall appoint an attorney to represent such person in such proceeding and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

According to Section 8646, if the county court should appoint the prosecuting attorney to defend the insane person, the prosecuting attorney would be representing conflicting interest. Under Section 11318 R.S. Mo. 1929, the prosecuting attorney must represent the county court in all of its proceedings and could not at the same time represent an insane

person which is a matter brought by the county court against the insane person.

According to Rule 35 of the Supreme Court, Sub-Division 2, as set out in paragraph 6, and which is related in Volume 339 Missouri, the Supreme Court states:

"Adverse Influences and Conflicting Interests.--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 canon, 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 reported."

This rule was also confirmed in the case of In re: Conrad, 105 S.W. (2d) 1.

In State v. Holtkamp, 51 S.W. (2d) 13, paragraph 17, the court held as follows:

"***** Whether one side or the other is right is unimportant in this case. Both sides seek to have Thomasson adjudged insane and each seeks to prevent control of Thomasson by the others. No attorney for either side of that controversy could rightly represent him. Much less can such an attorney waive any of Thomasson's constitutional or statutory rights. Wurdeman appeared for Ella F. Bolles, informant, against

Thomasson in the first proceeding in St. Louis County, and by that act alone is disqualified to appear for him, or waive any of his rights in another like proceeding in the same court."

In the above case several of the relatives of the insane person had filed different proceedings in different probate courts asking that the party be declared insane. One of the attorneys in a former proceeding represented one of the relatives in the insanity hearing and later attempted to represent the insane person in another proceeding. The court in passing upon the case, refused to allow the attorney to even change from one interest to the other interest and stated that the attorney could not represent conflicting interest even after he had left the employe of the other party to the law suit. This holding was also held in State v. Mueller, 51 S.W. (2d) 8; 330 Mo. 641.

CONCLUSION

In conclusion it is the opinion of this office that the county court cannot appoint the prosecuting attorney of a county containing a population of less than one hundred thousand, to represent the insane person at a hearing called before the county court of such a county.

Respectfully submitted,

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APPROVED:

J.E. TAYLOR
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