

PROSECUTING ATTORNEY: Duty to represent county hospitals.  
COUNTY HOSPITALS: May spend hospital funds to pay cost of litigation, but may not hire or pay private counsel.

October 7, 1939

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Dear Sir:

This will acknowledge receipt of your letter dated September 27, 1939, asking our opinion on two questions that have arisen as a result of our opinion of September 9, 1939, to W. T. Conley, holding that osteopaths were not authorized to practice their system of healing the sick in the Boone County Hospital. The questions are:

- (1) May the board of trustees of said hospital retain private counsel to represent said institution in the event a suit is brought to ascertain the right of osteopaths to practice in the hospital, or is it the duty of the county prosecuting attorney to represent the institution?
- (2) May the board, if authorized to retain private counsel, pay attorneys fees, expenses and cost of litigation out of hospital funds?

The Boone County Hospital is one organized under the provisions of Article 4, Chapter 120, R. S. Mo. 1929. It was established by a petition and vote on the question by the citizens of Boone County and was built and is supported by a tax levied upon the taxable wealth of the county. The end sought to be reached by the establishment of the institution was to furnish the inhabitants of the county adequate facilities so that they may derive the greatest benefit from medical care. Said institution is also for

the use of the indigent, insane and tubercular inhabitants of the county. In order to effectuate this purpose, said institution is invested with two of the highest attributes of sovereignty - the right to be supported by taxation and the power of eminent domain by the county in its behalf.

This summary clearly illustrates that the maintenance of this hospital is but a valid, authorized function of the county as a governmental unit that has long been recognized.

Section 11316 R. S. Mo. 1929, provides:

"The prosecuting attorneys shall commence and prosecute all civil \* \* actions in their respective counties in which the county \* \* \* may be concerned, defend all suits against the county \* \* \* \* ."

Section 11318 R. S. Mo. 1929, provides:

"He (the prosecuting attorney) shall \* \* defend \* \* \* all civil suits in which the county is interested, represent generally the county in all matters of law \* \* \* ."

Is not the county "concerned" and "interested" in litigation affecting a unit of the county government? We think it is vitally concerned in seeing that the statutes under which the hospital operates are not violated by permitting unauthorized persons to use the institution. It will be noticed also that the above statutes in speaking of the prosecutor's duty to represent the county do not restrict it to suits in which the county is "defendant" or "plaintiff" or a "party".

In United States vs. Burton 131 Fed. 552, defendant, a United States Senator, was charged with receiving a pecuniary compensation for services rendered for a certain company in a matter pending before the Post Office Department. At that time (1904) a federal statute existed prohibiting a senator from receiving compensation for services rendered

by him to any person in relation to a matter in which the United States was interested. The service rendered was in connection with a "fraud order" issued by the Postal Department. The court held that the United States was interested in the fraud order, saying of the word "interested", "Its primary meaning is 'to be concerned in a cause or its consequences,' and this meaning is the one which ordinarily should be given to legislative enactments."

We think the county and its people are concerned in any action affecting the Boone County Hospital - a public institution, and it is the duty of the Prosecuting Attorney of Boone County to represent said institution in any litigation affecting it.

The next question to be disposed of is: May the board of trustees of said institution retain private attorneys, even though it is the duty of the prosecutor to represent them, and pay said attorneys out of hospital funds.

In *Dixon v. Livingston County* 70 Mo. 239, the point involved was whether or not a county could hire private counsel to represent it in a certain matter. The statute at that time (1871) authorized the county court to hire a county attorney except that if the circuit attorney, of the judicial circuit in which county was, lived in the county he was to be that county's legal counsel. The county court of Livingston County retained private counsel to represent the county even though the circuit attorney lived in Livingston County. This case was one by said private counsel to collect his fee. The petition was successfully demurred to and on this the court said, l.c. 243:

"We are of opinion that the demurrer to the petition was properly sustained, on the ground that the duty of prosecuting such suit was, by express statute, cast upon the circuit attorney, and that the county court had no warrant in law to employ another attorney to perform this duty."

The rule that would seem to be announced in that case is

that if the legislature provides legal counsel for a governmental agency it must rely on that legal counsel for its representation and can not hire private counsel to represent it. By analogy that case applies to the instant question with equal force. The legislature has designated the prosecuting attorneys to attend to litigation which interests the county and having done so it impliedly prohibited the employment of other counsel.

The remaining question deals with how the expenses and cost of litigation (exclusive of attorneys fees) affecting the Boone County Hospital are to be paid.

Section 13976 R. S. Mo. 1929 provides for the levy of a tax to support county hospitals. This section then provides that said taxes "shall be collected in the same manner as other taxes are collected and credited to the 'hospital fund' and shall be paid out on the order of the hospital trustees for the purpose authorized by this article and for no other purpose whatever."

The purpose that said funds can be spent for, and upon which this question turns, is found in Section 13978, Laws 1937, page 357, and is - maintenance, supervision, care and custody of the grounds, rooms or buildings comprising the hospital.

The board having supervision, care and custody of the hospital also has the duty to see that no one uses said hospital facilities except those that the legislature authorized.

It is a familiar rule of law in this state that where an officer is given express power there is carried with the express grant by necessary implication every other power necessary and proper to the execution of the power expressly granted. (Ex parte Sanford 236 Mo. 665; State ex rel. v. Speer 284 Mo. 45). Here we have the board with the express power to supervise and control the hospital and to spend the hospital fund for that purpose. The law establishes who may use the county hospital facilities and a part of the board's supervision and control is to see that no one except those authorized do use said facilities. If a law suit becomes necessary to maintain said supervision and control, then by implication the board of trustees may spend the hospital fund

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to effectuate their express power to supervise and control the hospital.

CONCLUSION

Therefore, it is our opinion that the Board of Trustees of the Boone County Hospital may not retain private counsel to defend a suit brought by an osteopath to determine said osteopath's right to treat patients in said institution. The prosecuting attorney is charged with this duty under the law. However, the trustees may spend "hospital funds" to pay necessary costs of this litigation, exclusive of attorneys fees.

Respectfully submitted,

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APPROVED:

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LLB:RT