

PROSECUTING ATTORNEY: Special Prosecuting Attorney not  
entitled to salary or fees.

July 18, 1939

Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an  
opinion, dated July 11, 1939, which reads as follows:

"The County Court of Johnson County has  
submitted to us copy of a bill which was  
presented to them for the pay to a special  
prosecutor appointed by the Circuit Judge,  
we presume under the provisions of Section  
11322 R. S. Missouri, 1929. You will note  
that the bill was approved by the Judge of  
the Circuit Court.

"The County Court desires to know, first,  
what are its rights concerning the approval  
or disallowance of this account, and if  
they, the county court, consider the amount  
requested excessive, do they have a right to  
compromise that amount?

"Second, as the statutes specify the amount  
that is to be paid for Prosecuting Attorney  
per annum, should the amount paid a special  
prosecutor under these circumstances be  
charged as a part of the Prosecuting Attorney's  
annual compensation?

"As the Court desires to withhold consideration  
of this account until they can be advised, we  
would appreciate an opinion from your office  
concerning the above questions.

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"The special council in this particular case has submitted an explanation of his charge which we are enclosing herewith."

According to the last decennial census, the population of Johnson County was 22,413, and by reason of that population the prosecuting attorney of Johnson county is on a salary which is set out in section 11314 Session Laws of 1933, page 178, which partially reads as follows:

"The prosecuting attorney shall receive for his services per annum, to be paid out of the County treasury, \* \* \* \* \*; in all counties now or hereafter having a population of 20000 and less than 25,000 inhabitants the sum of \$2000.00"

Under the above section the prosecuting attorney is on a salary basis and not a fee basis.

Section 11322 R. S. Missouri, 1929, reads as follows:

"If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

Section 11324 R. S. Missouri, 1929, reads as follows:

"The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

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The word "fees" as used in section 11324, supra, should not be considered as a salary and it was so held in the case of State ex rel v. Patterson et al., 152 Mo. App. 264, l.c. 268, where the Court said:

"The prosecuting attorney receives no fees as compensation for his services and it is clear a special prosecutor can receive none since there is a positive mandate of the statute that all fees must be paid into the public treasury and in the absence of express statutory warrant they cannot be diverted to any other use or purpose.

"But relator argues that the term 'fees' in section 1014 should be defined to mean the salary of the prosecuting attorney in counties where the law gives him no other compensation than a salary. This section appears in the article of the statutes relating to 'Circuit and Prosecuting Attorneys' and we think it sufficiently discloses the legislative intent that its provisions should apply only to those counties mentioned in section 1005 and that, even where applicable, it does not authorize the payment of any salary to the special prosecutor. The rule is well settled that a public officer cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation must be strictly construed. (Shed v. Railway, 67 Mo. 687; Gammon v. LaFayette Co., 76 Mo. 675; State v. Wofford, 116 Mo. 220; State ex rel v. Walbridge, 153 Mo. 194; Sanderson v. Pike Co., 195 Mo. 598.)"

Under section 11322, supra, the Court was authorized to appoint a special prosecutor under the facts set out in your request, and it was so affirmed in the case of State v. Jones, 268 S.W. 83, pars. 1,2, where the Court said:

"The information charged the defendant with

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operating a motor vehicle while in a state of intoxication. Mr. Massengill, the prosecuting attorney of New Madrid county, filed the information and was the principal witness for the state. The evidence discloses that he is an interested party; his car and the car of the defendant were in collision. On account of his personal interest in the matter, he was disqualified to act as prosecuting attorney, or to prefer a charge based on the alleged criminal conduct of the defendant. Section 742 R. S. 1919. The trial court had inherent power, independent of the statute, to appoint a special prosecuting attorney for the state when the prosecuting attorney, for any reason, was disqualified. 32 Cyc. 719."

Also it was so affirmed in the case of State v. Wilson, 200 Mo. 23, l.c. 28, where the court said:

"That the special prosecuting attorney was duly appointed appears from the record of the court on the twenty-first of February, 1905, wherein it is recited that Mr. Moss, the regular prosecuting attorney of the county, had been employed as counsel by the defendant and for that reason the court appointed Mr. Scott as special prosecuting attorney for this case. Section 4955, Revised Statutes 1899, provides: 'If the prosecuting attorney . . . be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant . . . either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause.' And section 4957, Revised Statutes 1899, provides: 'The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present.' That a special prosecutor appointed by virtue of these sections has all the power for the purposes of the case in which he is appointed as the regular prosecuting attorney, there can be no doubt. (State v. Griffin, 87 Mo. l.c. 615, 616; State v. Moxley, 102 Mo. l.c. 383, 384.)"

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Under the holding in the case of State ex rel v. Patterson, 152 Mo. App. l.c. 268, the court specifically held that where the prosecuting attorney receives no fees as compensation for his services it is very clear a special prosecutor can receive none and that there is a positive mandate of the statute that all fees must be paid into the public treasury, and in the absence of express statutory warrant they cannot be diverted to any other use or purpose. The court also in that case held that a public officer even though he is specially appointed cannot demand any compensation for his services not specifically allowed by statute and that statutes providing such compensation must be strictly construed. We find no statutory authority allowing the county court to pay a special prosecuting attorney who has been appointed temporarily for the trial of one specific case. The courts have placed the appointment of a special prosecutor in the same bracket as that of an attorney appointed by the court to defend in a criminal action. In neither position does the statute set out for the payment of a salary, either by statute or by a written agreement of the county court. This was so held in the case of State ex rel v. Patterson, 152 Mo. App. 264.

#### CONCLUSION

In view of the above authorities, it is the opinion of this department that a special prosecuting attorney cannot be allowed a fee or salary for the reason that the statutes do not provide for such a salary or fee and that the county court cannot by written contract allow such a salary or fee. In view of this holding it is further the opinion of this department that since the special prosecutor cannot be allowed a fee or salary it would be impossible to deduct a fee or salary from the salary allowed the prosecuting attorney.

APPROVED:

TYRE W. BURTON  
(Acting) Attorney General

WJB:RW

Respectfully submitted,

W. J. BURKE  
Assistant Attorney General