

OPENING OF
COURTS:

No formal opening of Probate or Magistrates court is
required.

November 21, 1949

11/22/49

Honorable Calvin F. Hoy
Judge of the Probate and
Magistrate Courts of Crawford County,
Steelville, Missouri



Dear Sir:

This office is in receipt of your recent request for an official opinion. The matters upon which you desire an opinion are thus stated by you.

"There seems to be some confusion and misunderstandings relative to the Sheriff's duty regarding the attendance of Probate and Magistrate Courts. The law specifies that the Sheriff or his Deputy shall be entitled to \$3.00 per day for attendance upon these Courts. The question is: Do the Probate and Magistrate Courts have to be opened and be in session in order to make their judgments valid, and if so, is it mandatory that the Sheriff shall open the Court, or, can the Judge open his own Court?

"Under Section 14 of the 1945 Magistrate Code, the statute provides that the Magistrate shall hold Court for trials of all causes as often as may be necessary to meet the needs of justice, and he may hold Court on any day, except Sunday, and when so required the Sheriff shall be present in person, or one of his Deputies shall attend the Court; it does not specify what his duties are.

"In Section 2034, 1939 Statute, the law provides that the Sheriff shall attend each Court held in their County except where it shall otherwise be directed by law and then specifies the duty of the attending officer, which shall be to furnish stationery, fuel and other necessary things for the use of the Court. It will be noted that in none of these provisions does the law state specifically that it is the duty of the Sheriff or his Deputy to open Court, but it has been a custom for many years for the Sheriff to open Court for the transactions of it's

business. In State Ex Rel vs. Brown, 146 Mo. 401, which was a mandamus proceeding by the Sheriff of the City of St. Louis against the City Auditor to compell the auditor to pay to the Sheriff certain fees for attendance upon the Court, which is a statutory requirement, which must be strictly construed. Now the question is: Is this \$3.00 fee a statutory fee that can be charged for the opening of Courts, or, can only be charged for the things enumerated in the sections herein set out? And is it necessary for the Magistrate in having a trial with, or without a jury, to be formally opened in order to make his judgments valid, and if so, does he have the authority to open his own Courts, or must it be done by the Sheriff or his Deputies?

"In these small counties, as you know, the Magistrate Judge is also a Juvenile Judge and a Probate Judge. Assuming that he would have an insanity hearing and would have to call a special term in his Probate Court, and then have a trial of a criminal case with or without a jury in the Magistrate Court, in that event would it be necessary to open both Courts formally in order to carry out the regular duties of the Court and make his judgments secure? I am frank to say, that I have found no decision construing this statute by our higher courts for which reason I am asking your opinion on this question?"

We believe that at the beginning of our consideration of these various issues we should point out that the offices of probate and magistrate judge are separate and distinct. This fact is well established and does not, we believe, need to be supported by citations of law.

We would also point out that both courts are courts of record.

Section 2034, Mo. R.S.A. 1939, states:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

However, this section was amended by the Laws of 1945, page 805, and now reads, 2034 Mo. R.S.A. 1939, as amended:

"The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court." (Underscoring ours.)

This section would of course apply to both probate courts and magistrate courts.

Section 2811.114, Mo. R.S.A. 1939, states:

"Every magistrate may hold court for the trial of all causes of which he has jurisdiction as often as may be necessary to meet the needs of justice, and may hold such court on any day, except Sunday, on which any cause may be set for trial, or any cause adjourned; and when so required the sheriff shall be present in person or by deputy and attend on said court." (Underscoring ours.)

By the two above sections therefore it is made clear that it is no longer the duty of the sheriff to attend upon a court unless he is directed by the court to attend. This being so, the inference is plain that the probate judge may open the probate court himself, and that as magistrate judge he may open magistrate court.

However, there is no current Missouri law requiring that a court be formally opened by any official making a public proclamation to that effect; by uttering the words "Hear Ye! Hear Ye! The honorable _____ court of _____, _____ is now in session;" or by any other word or act. In regard to this matter Laws of Missouri 1943, page 359 (Sec. 847.9 Mo. R.S.A. 1939), states:

"Section 9. Term of court shall convene and expire, how and when.--Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge, the judges, or other officials, and shall continue to be open at all times until and including the day preceding the next regular term on which

day it shall expire by operation of law."

"Annotation."

"Oklahoma Laws 1935, art 2, sec. 1, p. 29
(20 Okl. Stat. Ann. sec 95). No change made
in the Legislature. See Mo. R.S.A. secs. 2013-
2021 repealed by implication.

"Under this section the formal opening and
continuance of court terms are not required."

The above quoted section is part of the new Civil Code of
Missouri which became effective January 1, 1945.

Laws of Missouri, 1943, page 357 (Sec. 847.2 Mo. R. S. A. 1939)
under the heading: "Designation and scope of code" reads:

"Sec. 2. This code shall be known and cited as the
Civil Code of Missouri and shall govern the procedure
in the supreme court, court of appeals, circuit courts
and common pleas courts in all suits and proceedings
of a civil nature whether cognizable as cases at
law or in equity, unless otherwise provided by law.
It shall be construed to secure the just, speedy, and
inexpensive determination of every action."

The above section does not state that probate courts shall
be governed by this code, and at the time of passage of the Civil
Code magistrates were not yet in existence, but if the Supreme
Court of Missouri, the Missouri courts of appeals, circuit courts,
and courts of common pleas, do not have to be formally opened by
a judge or other official (see Sec. 847.9 quoted above), we cannot
conceive that such inferior courts as probate and magistrate would
have to be so opened. Furthermore, as pointed out above, there is
no Missouri law stating that probate and magistrate courts should
be formally opened.

In further consideration of these issues, we would point out
that by Section 2034, Mo. R.S.A. 1939, as amended, quoted above,
a probate judge may have the sheriff in attendance upon his court
whenever he so desires; and that by Section 2811.114, Mo. R.S.A.
1939, the magistrate may do likewise. Since these are two separate
courts, as we stated above, the sheriff would be entitled, under
Section 13411, Mo. R.S.A. 1939, to \$3.00 for attending each court,
and \$6.00 per day for the two if he attended both of them the same
day. Section 13411, in that part pertinent to this issue reads:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day \$3.00."

This section gives the sheriff this three dollars for being in attendance upon courts merely. If requested by the court, he shall perform such duties as he is directed to perform. But if not requested by the court to perform any duties whatever, he may still claim his three dollar fee.

In view of the above general propositions of law the answer to your questions, in the order in which you ask them, is:

Probate and magistrate courts do not have to be formally opened by the judge or sheriff in order to make their judgments valid.

The three dollar fee allowed sheriffs for attendance upon courts is a statutory fee that can be charged by the sheriff for attendance upon courts when directed by the judge to so attend.

It is not necessary for the magistrate, in having a trial with or without a jury, to formally open his court in order to make his judgments valid, nor for the sheriff or anyone else to do so.

CONCLUSION

It is the conclusion of this Department that probate and magistrate courts do not have to be formally opened by the judge, sheriff or any other official.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

HUGH P. WILLIAMSON
Assistant Attorney General

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