

DIVISION OF HEALTH:
PROSECUTING ATTORNEY:
ATTORNEY GENERAL:

The Division of Health may join as relator in an action by the Prosecuting Attorney of a county or the Attorney General of the state in a legal action; that the Prosecuting Attorney of a county may exercise discretion as to whether he institutes a civil action when requested to do so by a state department such as the Division of Health.



September 28, 1953

Honorable Rex A. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"In the city of Poplar Bluff, Butler County, Missouri, we have an out-dated and inadequate sewer system, which does not have a disposal plant. Sewage is piped by underground sewer to Black River, which runs through the city.

"A group of land owners in one section of the city, which was recently opened for the construction of new homes, have petitioned the City Council of the city of Poplar Bluff to extend the present sewer system so that the residents of this new area can use the present sewer system. The City Council and the City Engineers presented a plan to the State Board of Health showing the present sewer system and proposed extension, and asked that it be approved. The State Board of Health refused approval, because the present system was inadequate and have advised the city officials that no changes or extensions will be approved in the city of Poplar Bluff until a disposal plant has been built. I have been advised that the city officials are proceeding to make the extension of the present sewer system to include the persons affected and I have also been advised that the State Board of Health is making a request that I file an Injunction Suit in the Circuit Court of Butler County against the city of Poplar Bluff, to stop this proposed extension.

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"If the proposed extension is enjoined the persons residing in this area will be damaged, because they have no method of disposing of their sewage. The proposed extension in my opinion is necessary and is the lesser of the two evils. I am also of the opinion that in the event I file an injunction suit against the city that the court upon a hearing would not grant an injunction and under the circumstances as they exist.

"I would like an opinion as to whether or not the State Board of Health has the right to bring an injunction suit under these circumstances and if it is my duty as Prosecuting Attorney to bring the injunction suit at the request of the State Board of Health, even though I feel that the suit should not be filed and that the injunction should not be granted.

"Since the construction of this new extension is now started, I would appreciate hearing from you as early as possible."

In regard to the power of the Division of Health of the Department of Public Health and Welfare to file such a suit as is the subject of your inquiry, we refer to the case of State ex rel. Shartel, Atty. Gen., et al. v. Humphreys, 93 S.W. 2d 924. This was an action in mandamus by the State of Missouri at the relation of the Attorney General and the State Board of Health to compel the cities of Maplewood and Richmond Heights to do certain things regarding sewers and to abate a public nuisance. At l.c. 927 of its opinion, the Court states:

"The next question is: Did relators have authority to institute and prosecute this cause? The nuisance sought to be abated was a public nuisance and a grievous one, and it also appears, as alleged, that the State Board of Health endeavored, without avail, to get Maplewood and Richmond Heights to agree upon some plan. Despairing of any relief by conference and persuasion, the State Board of Health brought the matter to the attention of the Attorney General and this cause was filed. Section 9015, R.S. 1929, Mo. St. Ann. Sec. 9015, p. 4178, makes it the duty of the State Board of Health 'to safeguard the health of the people in the State, counties, cities, villages and towns,' and under the facts here the Attorney General could have properly proceeded with or without joining as relator with the State Board

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of Health, Section 12276, R.S. 1929, Mo. St. Ann. Sec. 12276, p. 586; 46 C.J. 740; State ex rel Crow v. Canty, 207 Mo. 439, 105 S.W. 1078, 15 L.R.A. (N.S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787; State ex rel. Lamm v. City of Sedalia (Mo. App.) 241 S.W. 656; State ex rel. Detienne v. City of Vandalia, 119 Mo. App. 406, 416, 94 S.W. 1009."

In this regard the Court, in the case of State ex rel. Westhues v. Sullivan, 283 Mo. 546 stated, at l.c. 569:

"The first contention is that Henry J. Westhues, as Prosecuting Attorney of Cole County, was not authorized to bring this suit, in the name of the State. That there are certain suits which the prosecuting attorneys of the counties can bring in the name of the State is made apparent by our more recent holdings. (State ex rel. v. Lamb, 237 Mo. l.c. 450 and 454; State ex rel. v. Williams, 221 Mo. l.c. 261.)

"The whole matter is thoroughly discussed by FERRISS, J., in the Lamb case, supra. The rule is, that such prosecuting officer can not proceed in the name of the State, save and except the matters involved are matters arising within and pertaining to the jurisdiction of such prosecuting officer. In other words, they must be matters which concern the State in the limited territory over which such officer has control, or in which he has power to act. His limit is the county for which he was elected. Westhues as Prosecuting Attorney of Cole County can use the name of the State in such matters in which the State is interested within the confines of the said County of Cole. The real question is whether or not the things pleaded are matters localized to Cole County, or whether the State's interest in the proceeding is one of broad expanse, and covering a matter having a state situs rather than a county situs. If the latter, the State must proceed through the Attorney-General; if the former, it may proceed through the local prosecuting officer. Upon this point nothing can be added to the learning of the two recent cases cited, supra. In addition the statutes fix their respective lines of action. That of the Attorney-General is state-wide, whilst that of the prosecuting attorney is local. Whether the one or the other can act must be determined from the nature of the subject-matter of the action.**

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From the above it appears that while the Division of Health as an agency of the State of Missouri, cannot itself file the type of lawsuit, injunction, which you mention, it can properly request the Attorney General of the State of Missouri or the Prosecuting Attorney of a county to do so, and may join as relator therein.

Your next inquiry is, whether, when so requested, it is your absolute duty as Prosecuting Attorney to file such suit. In this regard we direct attention to a copy of an opinion rendered by this department on June 9, 1950, to Honorable Robert A. Dempster, Prosecuting Attorney of Scott County. This opinion holds that a Prosecuting Attorney may exercise discretionary powers in instituting civil actions in which his county is concerned. We would emphasize that if the Prosecuting Attorney refuses to institute such proceedings his reasons for doing so should not be personal, but based upon sound legal grounds.

CONCLUSION

It is the opinion of this department that the Division of Health may join as relator in an action by the Prosecuting Attorney of a county or the Attorney General of the state in a legal action; that the Prosecuting Attorney of a county may exercise discretion as to whether he institutes a civil action when requested to do so by a state department, such as the Division of Health.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

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