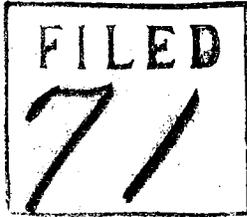


PUBLIC OFFICERS: (1). A public official, otherwise qualified, may be
NOTARIES PUBLIC: appointed and hold a Notary Public commission
and use said commission for purposes outside
the duties of the particular office;
(2). Prosecuting Attorneys in this state, if
Notaries Public, may administer oaths to and
take affidavits of complainants in criminal
cases. However, to avoid complications it
would be best not to do so.



January 22, 1954

Honorable W. H. Pinnell
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Pinnell:

This office is in receipt of your letter requesting an opinion first, whether it is unlawful for a public official to hold a Notary Public commission and using said commission for purposes outside the duties of the particular office, and, second, whether the Prosecuting Attorney of a county may himself notarize complaints (in criminal cases) instead of having the same signed (and sworn to) before a Magistrate Judge or his Clerk. Your letter requesting an opinion on the two questions reads as follows:

"I would like an opinion from your office on the following:

"Is there anything illegal or unlawful in a public official holding a Notary Public commission and using said commission for purposes outside the duties of the particular office. I would like your further opinion as to whether the Prosecuting Attorney may Notarize Complaints instead of having the same signed before a Magistrate Judge or his Clerk.

"Often times it is extremely difficult to have a Complaint notarized before the Magistrate Judge or his clerk and therefore I would appreciate your opinion on this matter."

Section 486.010, RSMo. 1949, under the title of Notaries Public, providing for the appointment of Notaries Public, does not prescribe

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any qualifications for the office of a Notary Public except that of residence and age. The section provides that the appointee shall have attained the age of 21 years, and shall be a citizen of the United States and of the State of Missouri. Any person possessing these two qualifications is eligible for an appointment and commission as a Notary Public.

Section 486.020, RSMo 1949, prescribing the powers and duties of Notaries Public in this state reads as follows:

"They may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices. They may receive the proof or acknowledgment of all instruments of writing relating to commerce and navigation, take and certify relinquishments of dower and conveyances of real estate of married women; the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing, in like cases and in the same manner and with like effect as clerks of courts of record or authorized by law; take and certify depositions and affidavits and administer oaths and affirmations, and take and perpetuate the testimony of witnesses in like cases and in like manner as justices of the peace are authorized by law; make declarations and protests, and certify the truth thereof under their official seal, concerning all matters by them done by virtue of their offices, and shall have all the power and perform all the duties of register of boatmen."

The statute prescribes a definite and fixed term of four years for a Notary Public; he must take and subscribe the oath of office on his commission, give bond, keep records of his acts and provide a seal of office. He is, by these requirements and powers, when fulfilled, made a public officer by the statute.

There is no statute or provision in the Constitution prohibiting any public officer, including Prosecuting Attorneys, from being appointed and commissioned as a Notary Public. The only question

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that might arise would be whether there might be "incompatibility" between the other public office and the office of Notary Public, in case both offices are held by the same person.

By the terms of Section 12, Article III of the Constitution of 1945 of this state, State Senators and Representatives, who are otherwise expressly prohibited from holding any other offices or employment under the United States, the State or any municipality thereof are made an exception, and may hold, respectively, the office of Notary Public.

Sections 56.060, 56.070, 56.080, 56.090 and 56.100, RSMo. 1949, define and point out the duties of Prosecuting Attorneys. These sections are of ready access for an understanding of such duties and will not be quoted in this opinion. Suffice it to say, however, that none of the duties of a Prosecuting Attorney, as defined in said statutes, partake of or conflict with the duties and privileges of Notaries Public as the same are defined in said Section 486.020, RSMo 1949. Neither do the duties, powers or privileges of a Notary Public partake of or conflict with the duties, powers and privileges of a Prosecuting Attorney. There is no way in which the two offices would conflict with one another. They are compatible and both offices may be held by the same person.

Answering your first question, it is the view of this office that it is not unlawful, but on the contrary, it is lawful, for any public officer, including Prosecuting Attorneys, to hold and use a Notary Public commission for purposes outside of the duties of the particular office. Your second question upon which you request the further opinion of this office is whether the Prosecuting Attorney may notarize complaints instead of having the same signed before a Magistrate Judge or his Clerk.

By this question we understand your letter to mean complaints in criminal cases, and we understand the use of the word "notarize" in your letter to mean administering the oath to a person making an affidavit charging some person, or persons, with a violation of the criminal laws. Your letter states that it is extremely difficult to have a complaint notarized before the Magistrate Judge or his Clerk as the reason for requesting the opinion of this office on this second question.

Your second question would involve, we believe, the use of a notary's commission in taking the preliminary steps necessary for the prosecution of the persons who would be charged with the commission of criminal offenses such as may be set forth in such complaints. If the Prosecuting Attorney should administer the oath to the complainant he would not, as a Notary Public, be

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entitled to charge or collect a fee therefor, under the terms of Section 56.280 which fixes the salary and compensation of the Prosecuting Attorneys in Class 3 and Class 4 counties. Barry County is one of the Class 3 counties of this state. The Prosecuting Attorney in such a case would not be permitted to collect any fee under the terms of Section 56.340 because such a charge could not be an item to be taxed as costs in any case to be collected and at the end of each month paid to the County Treasurer. For these reasons it plainly appears that the Prosecuting Attorney would not be authorized to charge, collect or retain fees for notarizing complaints made before him as a Notary Public. The vital question here, however, is whether the Prosecuting Attorney may administer the oath necessary in such complaints at the beginning of a criminal case and turn such complaints over to himself as Prosecuting Attorney to be used where he is the prosecutor.

Our statutes do not require an affidavit in a criminal case to be made before any particular officer. Section 545.250, RSMo. 1949, regarding the making of such affidavits reads as follows:

"When any person has knowledge of the commission of a crime, he may make his affidavit before any person authorized to administer oaths, setting forth the offense and the person or persons charged therewith, and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney, or deposit it with the prosecuting attorney, furnishing also the names of the witnesses for the prosecution; and it shall be the duty of the prosecuting attorney to file an information, as soon as practicable, upon said affidavit, as directed in section 545.240."

If the making of an affidavit before the Prosecuting Attorney as a Notary Public should come within the provisions of Section 557.070, RSMo 1949, as a false, or an allegedly false, affidavit, the prosecution of such person would devolve upon the Prosecuting Attorney. Such a situation might become a matter of personal interest involving the prosecuting attorney as a witness and would preclude him from prosecuting the case, if he were still Prosecuting Attorney. This condition, if such existed, would demand that the Court before which the case would be pending should appoint, under the terms of Section 56.110, RSMo 1949, a substitute in his place to prosecute the case.

There is no constitutional or statutory provision prohibiting

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the prosecuting attorney, if he were a Notary Public, from administering the oath to and taking the affidavit of a complainant in a criminal case. Should he follow that course of proceedings it might, as suggested in the supposed incident noted, or, perhaps under other conditions, become embarrassing to the prosecuting attorney and would be the means, by his own act of preventing the performance by him of his duties as prosecuting attorney defined by the statute of this state. Of course, under such conditions and circumstances a prosecuting attorney would not be violating any statute by remaining in the case, although he might be a witness, but out of an exact sense of the uninfluenced administration of justice the court may, in its discretion, and no doubt would, appoint another to act in his stead. This has been done in this state on occasion, and the appellate courts have sustained the trial court in so doing, or, if such substitute was not appointed by the trial court the appellate courts have reversed cases in order that a disinterested prosecutor be appointed when the regular prosecuting attorney may be interested. A case involving these principles was considered by our Springfield Court of Appeals in State v. Nicholson, 7 S.W.(2d) 375. That was a case however which did not arise from a mere inadvertance or unintentional act of the prosecuting attorney. The case recites that the prosecuting attorney in the case was not only a witness, having made the affidavit to a search warrant to search the premises of the defendant, but he did many other things, as recited in the decision, of an improper and prejudicial character. There would be nothing in the instant case growing solely out of the prosecuting attorney, if a Notary Public, administering an oath and taking an affidavit of a complainant that would be wrongful or unlawful, in and of itself, except to become an impediment to the prosecuting attorney continuing in such case as prosecutor. Of course, such a theoretical case might never arise, but if it, as is always a possibility, should arise from acts performed with the best of intentions, it would disqualify the prosecuting attorney from further acting in the case.

The Springfield Court of Appeals in the Nicholson case, respecting the interest of the prosecuting attorney disqualifying him to act in the case, l.c. 378, said:

"Whenever it appears to the trial court that the personal interest of the prosecuting attorney in any particular case, no matter how that interest may arise, is such as to indicate that he might be influenced thereby and might not be altogether fair to the defendant in the trial of the case, he should be held disqualified and a special prosecutor appointed for that case. In this statement of the law we are upheld by the Supreme Court of this State. State v.

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Jones, 306 Mo. 437, 268 S.W. 83."

The case of State v. Jones, 306 Mo. 437, cited in the Nicholson case, l.c. 446, on the question of the necessity of the prosecuting attorney being disinterested in a criminal case he prosecutes, said:

"* * *It was never contemplated that he should be empowered to set in motion criminal proceedings against a citizen in a case in which he is interested.
* * *"

It would appear proper for the prosecuting attorney, if he desires to avoid such complications, if he is a Notary Public, to decline to take affidavits to complaints in criminal cases.

A public official may be appointed and hold a Notary Public commission, including prosecuting attorneys, in this state.

It is lawful for a prosecuting attorney in this state, if he holds a Notary Public commission, to administer oaths to complainants who make affidavits to complaints in criminal cases. However, in order to avoid embarrassment and complications by becoming in anywise interested in such a case, it would be best for him not to do so.

CONCLUSION

Considering the premises, it is, therefore, the opinion of this office that:

- 1) It is lawful for a public official, including a prosecuting attorney, to hold a Notary Public commission and use said commission for purposes outside the duties of the particular office;
- 2) There is no constitutional or statutory provision prohibiting a prosecuting attorney, if he holds a Notary Public commission, from administering oaths to persons making affidavits as complainants in criminal cases. However, to avoid complications, and to avoid creating a condition which might cause him to be

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interested and cause a substitute to be appointed in his stead for the prosecution of the case, he should decline to do so.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON
Attorney General

GWC:mw:ir