

COUNTY COURTS: Cannot expend county funds for
THIRD CLASS COUNTIES: legal advice.



April 8, 1957

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Mr. Lance:

This department is in receipt of your recent request for a legal opinion, reading, in part, as follows:

"1. Does the County Court of a Class III county have authority to expend county funds to employ an attorney other than the Prosecuting Attorney to advise them upon matters of county government?"

"2. In the event that the Assessor in a Class III county makes a mistake in transferring figures from the assessment list submitted by his Deputy Assessor to the County Assessment Books, which mistake reduced the assessed valuation of personal property from \$50,000 to \$5,000, and this same mistake had occurred for three years in succession before it was discovered by the authorities, could the owner of the personal property which was assessed be made to pay State and County taxes upon the \$45,000 reduced valuation resulting from the mistake for each of the three successive years?"

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The first question inquires if the county court of a class three county has authority to expend county funds to employ an attorney other than the prosecuting attorney to advise them upon matters of county government.

Section 56.060, RSMo 1949, enumerates the general duties of the prosecuting attorney, and reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 56.070, RSMo 1949, requires the prosecuting attorney to represent the county in all civil suits and to perform certain other duties. Said section reads as follows:

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"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

Section 56.100, RSMo 1949, provides when the prosecuting attorney shall give his written opinion, and to whom, and is as follows:

"The prosecuting attorney shall, without fee, give his opinion to any magistrate court, and to any county court, or to any judge thereof, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer."

Section 56.250, RSMo 1949, permits the county courts of third and fourth class counties to employ special counsel in prosecuting or defending any suits by or against the county, and reads as follows:

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"The county courts of all counties in this state of the third and fourth classes may, in their discretion, employ special counsel or an attorney to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties, and may pay to such special counsel or attorney reasonable compensation for their services, such compensation to be fixed by the county court of such county, to be paid out of such funds as the county court may direct; and such counsel or attorney shall be a person learned in the law, and at least twenty-five years of age."

There is no indication of a legislative intent that the words expressed in Sections 56.070 and 56.100, supra, were to be given a technical meaning. Therefore, it must be assumed to be the legislative intent that the language expressed in said sections is to be given its plain or ordinary meaning.

The word "opinion" has been used in both sections, but the word "advise" does not appear in either section. However, since one of the commonly accepted definitions of the word "advise" is to give an opinion, it is believed that the words "advise" and "opinion" are synonymous in meaning and may be used interchangeably. Consequently, where the word "opinion" is used in each of said sections, it would include the meaning of the word "advise." We believe this is substantiated by the following definition of the word "advise" taken from Black's Law Dictionary:

"ADVISE. To give an opinion or counsel, or recommend a plan or course of action; also to give notice. Long v. State, 23 Neb. 33, 36 N.W. 310. To encourage. Voris v. People, 75 Colo. 574, 227 P. 551, 553.

"This term is not synonymous with 'persuade' (Wilson v. State, 38 Ala. 411), or with 'direct' or 'instruct.' Where a statute authorizes the trial court to advise the jury to acquit, the court has no power to instruct the jury to acquit. The court can

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only counsel, and the jury are not bound by the advice. *People v. Horn*, 70 Cal. 17, 11 P. 470. 'Advise' imports that it is discretionary or optional with the person addressed whether he will act on such advice or not. *State v. Downing*, 23 Idaho, 540, 130 P. 461, 462; *Brown v. Brown*, 180 N.C. 433, 104 S.E. 889, 890."

In this connection we direct your attention to the status of a county court and the powers it possesses under provisions of the Missouri Constitution of 1945 and present statutes. A very able discussion on the county court and its powers is given in the case of *State ex rel. Floyd v. Philpot*, 364 Mo. 735, in which the court said at l.c. 744:

"County Courts are not now named among the 'constitutional courts' in which the judicial power of the state is vested (Article V, Constitution of Missouri 1945), but such courts are recognized in the Article treating with 'Local Government,' and they are given authority to 'manage all county business as prescribed by law.' Section 7, Article VI, Constitution of Missouri 1945. The authorities are uniform to the effect that, outside of the management of the fiscal affairs of the county, such courts possess no powers except those conferred by statute. *Rippeto v. Thompson*, 358 Mo. 721, 216 S.W. (2d) 505, 508; *Bradford v. Phelps County*, 357 Mo. 830, 210 S.W. (2d) 996, 999; *Lancaster v. Atchison County*, 352 Mo. 1039, 180 S.W. (2d) 706, 708; *State ex rel. Walther v. Johnson*, 351 Mo. 293, 173 S.W. (2d) 411, 413."

From this excerpt of the opinion, it appears that a county court is no longer a "constitutional court" in which the state's judicial power is vested, and that under applicable provisions of the new Constitution, court decisions, and statutes of Missouri at the present time, a county court is the official body in each county having charge of the management of the county's financial affairs, and such court possesses no powers except those conferred on it by statute.

Sections 56.070 and 56.100, supra, confer the right on the county court to request legal advice of the prosecuting attorney in regard to the matters referred to in said sections, which are

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to advise the court generally on questions of law concerning proceedings pending before the court, or matters in which the county is interested, and pay such attorney for his services from county funds. When the court is in need of legal advice in such instances, it may request the prosecuting attorney for same, and it is the duty of the prosecuting attorney to give his free, oral or written opinion to the court upon the matter of inquiry, as provided by Sections 56.070 and 56.100, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

John M. Dalton
Attorney General

PNC:ml:vlw

Enclosures (2)