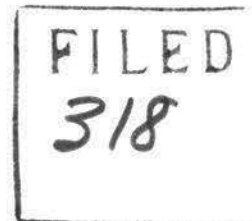


Answer by Letter (Klaffenbach)

December 1, 1970

OPINION LETTER NO. 318



Honorable Clarence W. Hawk
Assistant Prosecuting Attorney
Moniteau County Court House
California, Missouri 65018

Dear Mr. Hawk:

This letter is in answer to your inquiry concerning an interpretation of Section 56.240, RSMo 1969, with respect to the appointment, qualification and duties of the prosecuting attorneys in third and fourth class counties. Specifically you inquire whether the Court or any other parties can challenge the appearance of the assistant prosecuting attorney in the trial of a case in which the State is involved on the grounds that the prosecuting attorney is not out of the county, sick, or trying another case. Section 56.240 to which you refer states in part as follows:

"The prosecuting attorney in counties of the third and fourth classes may appoint one assistant prosecuting attorney who shall possess all the qualifications of a prosecuting attorney and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are liable. . . The assistant prosecuting attorney shall discharge the duties of the prosecuting attorney when the prosecuting attorney is sick or absent from the county, or when the prosecuting attorney is engaged in the

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discharge of the duties of his office so that he cannot attend. In counties of the third class the assistant prosecuting attorney shall assist the prosecuting attorney in any case when requested to do so by the prosecuting attorney, but the former shall be disqualified from defending in any criminal case. . . ." (Emphasis added)

The first sentence that we have underscored applies to both third and fourth class counties. The second sentence that we have in part underscored applies only to third class counties and in our view indicates that the legislature intended that the assistant prosecuting attorney of such counties shall assist the prosecuting attorney in any case when requested to do so by the prosecuting attorney regardless of whether or not the prosecuting attorney is sick or absent from the county or engaged in the discharge of the duties of his office so that he cannot attend. Any other interpretation would render meaningless the provision applicable to third class counties which we have emphasized.

While it might also be contended that the prosecuting attorney must be in attendance at every case in which the assistant prosecuting attorney "shall assist the prosecuting attorney" we believe that such would be an unreasonable construction and not a correct reflection of the legislative intent. The prosecuting attorney is of course charged with the duty of commencing and prosecuting all civil and criminal actions in his county in which the county or the state is concerned. Section 56.060, RSMo 1969. However, the provisions of that section by no means abrogate the well established rule that a deputy, or in this case the assistant prosecuting attorney, when acting as such has authority which is presumably commensurate with that of the prosecuting attorney. State v. Carey, 1 S.W.2d 143, 318 Mo. 813 (1927).

We also understand that the question has been raised concerning whether the assignment of the assistant prosecuting attorney by the prosecuting attorney to try any case is open to collateral question or attack by the court or third parties. In this respect we must bear in mind that the prosecuting attorney is an officer and the assistant prosecuting attorney is, in the exercise of his duties, also an officer and attendant to their official status is the presumption of legality and validity of their acts. In our view when the prosecuting attorney of a third class county requests the assistance of his duly appointed assist-

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ant prosecuting attorney to handle any case within his jurisdiction such a determination is the exercise of an act of discretion and such discretion is solely within his jurisdiction. Official acts of this nature cannot be impeached collaterally. Harvaugh v. Winsor, 38 Mo. 327 (1886). Note also the statement of the Supreme Court of Missouri in State v. Carey, 1 S.W.2d 143, 145:

"In affirming the ruling in the Hynes Case, supra, the Kansas City Court of Appeals in Browne's Appeal, 69 Mo. App. 159, said:

"'The existence of the conditions under which the assistant prosecuting attorney may act must be left to the decision of the prosecuting officer' and 'cannot be raised in * * * a collateral action.'"

The views that we have expressed in relation to these questions also finds support in the case of State ex rel. Griffin v. Smith, 258 S.W.2d 590, 363 Mo. 1235 (Mo. banc 1953), in which the Court stated l.c. 593:

"When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i.e., not merely ministerially] but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. This court has written much upon the broad discretion vested in a public prosecutor. State on Inf. of McKittrick v. Wymore, supra; State on Inf. of McKittrick v. Wallach, 353 Mo. 312, 182 S.W.2d 313, 318, 319. In this jurisdiction it is recognized that this public office is one of consequence and responsibility. The status of the prosecuting attorney as a public officer is given dignity and importance by our statutes. Sections 56.010 to 56.620, RSMo 1949, V.A.M.S. With every other attorney at law a prosecuting attorney is, of course, an officer of the court in a larger sense; but he is not a mere lackey

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of the court nor are his conclusions in the discharge of his official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's cases. A public prosecutor is a responsible officer chosen for his office by the suffrage of the people. He is accountable to the law, and to the people. He is 'vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney.
. . . ."

Very truly yours,

JOHN C. DANFORTH
Attorney General