

PROSECUTING ATTORNEY - ELIGIBILITY TO APPOINT AS PROBATION OFFICERS IN
COUNTIES OF LESS THAN 20,000

June 15, 1937.

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Mr. Percy W. Gullie,
Prosecuting Attorney,
Oregon County,
Alton, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion
wherein you state as follows:

"I would appreciate your opinion on
a little matter that has been called to
my attention by the Prosecuting Attorney
of Howard County, in regard to the
several Prosecuting Attorneys over the
State in Counties with less than 20,000
inhabitants being appointed as Probation
Officer of their respective Counties.
Mr. Jack H. Denny's letter is as follows:

"Section 14,171, R. S. 1929, provides
as follows: The Circuit Judge shall
designate or appoint an officer of the
County or some other person to serve as
Probation Officer under the direction of
the Court in cases arising under this
article. The Court may also designate
or appoint one or more persons to act
as deputy Probation Officers. Section
14,174 provides that in Counties of less
than twenty thousand inhabitants the
Probation Officer may receive such salary
as the Circuit Court may with the approval
of the County Court prescribe, not exceed-
ing \$300.00 per annum.

"In my county it is the custom in cases arising under the Juvenile Court Act for the Prosecuting Attorney to file the petition alleging the child to be neglected and delinquent, for him to summon the parents, to bring the child before the Court, to arrange with some person, usually the Sheriff, to keep the child someplace, separate and apart from the jail, and to otherwise handle the case. While the Circuit Judge as Judge of the Juvenile Court draws an additional salary for juvenile work, and the Clerk of the Court draws an additional salary for Juvenile work, the Prosecuting Attorney draws no additional salary for his work.

"I have suggested to my Circuit Judge that he appoint me as Probation Officer and recommend to the County Court that I draw an additional \$300.00 a year for my services. Since heretofore I have performed the same service gratuitously. This would not be a violation of the provisions of the State Constitution which provides that no person shall hold two offices at the same time. The Circuit Judge states that he is perfectly willing to do so, but he does not wish to establish the precedent of appointing the Prosecuting Attorney to this office and he suggested that I write to each of the Prosecuting Attorneys and endeavor to make such procedure a general practice over the State.'

"Please advise if this practice would be legal and good procedure?"

Oregon County, having a population of 12,220 inhabitants (official census 1930), comes within Article 9 of Chapter 125, R. S. Mo. 1929, relating to juvenile courts in counties under 50,000 inhabitants.

Section 14171, R. S. Mo. 1929, provides for the appointment of a probation officer by the circuit judge:

"The circuit judge shall designate or appoint an officer of the county or some other person to serve as probation officer under the direction of the court in cases arising under this article. The court may also designate or appoint one or more persons to act as deputy probation officers."

Section 14175, R. S. Mo. 1929, provides that it is the duty of every county officer to aid the probation officer:

"It shall be the duty of every county, town or municipal officer or department, to render such assistance as lies within his power to further the objects of this article. All associations or other agencies receiving any child under this law are hereby required to give such information to the court or any officer appointed by said court as said court or officers may require."

The question in the instant case is whether the duties of prosecuting attorneys and probation officers are so incompatible as to render it improper that one person should hold both offices at the same time.

In the case of State ex rel. v. Bus, 135 Mo. 1. c. 338, the Court in holding that where one officer has some supervision over the other, or is required to deal with, control, or assist him, the offices would be incompatible, said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of

the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Were it not for Section 14171, supra, which specifically provides that the circuit judge may designate an officer of the county, which necessarily includes the prosecuting attorney, the latter office might be said to be incompatible with the office of probation officer, inasmuch as by virtue of Section 14175, supra, it is made the duty of every county officer to render the probation officer every assistance possible.

Section 14174, R. S. Mo. 1929, provides the salary of the probation officer, in part, as follows:

"The probation officer may receive such salary as the circuit court may with the approval of the county court prescribe, not exceeding one thousand dollars per annum in counties of twenty thousand inhabitants and less than fifty thousand inhabitants, and not exceeding three hundred dollars per annum in counties of less than twenty thousand inhabitants."

The Court in the case of Board of Commissioners v. Wharton, 261 Pac. (Colo.) 4, l. c. 5, in holding that an officer who may and does hold two offices is entitled to compensation, said:

"And where an officer may, and does, hold two offices, he is entitled to the compensation attached to each. Lindsley v. Denver, 64 Colo. 444, 453, 172 P. 707, and many cases there cited."

Mr. Percy W. Gullie

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From the foregoing, it is the opinion of this department that it would be proper for the same person to hold the office of prosecuting attorney and the office of probation offices in counties of less than fifty thousand inhabitants, and further that said person would be entitled to the compensation of both offices.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

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