

PROSECUTING ATTORNEYS: SHERIFFS: When said officers may be appointed to act as Probation Officer.

August 4, 1937.

8/b

Mrs. W. W. Henderson,  
Executive Director,  
State Children's Bureau,  
Carrollton, Missouri.

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Dear Mrs. Henderson:

This department wishes to acknowledge your request for an opinion wherein you state as follows:

"A duty assigned to the State Social Security Commission by the 59th General Assembly is that of 'the supervision of juvenile probation under the direction of but not in derogation of the orders of Juvenile Courts.' See C.S.S.B. 125, Sec. 4, paragraph 4, setting out the duties of the State Commission as they apply to children's laws.

"This was formerly performed under the Board of Charities and Corrections Sec. 14172, R.S. 1929.

"A report has today been received by the Children's Bureau which functions under the Eleemosynary Board and carried this duty since they were transferred in 1933.

"The report received is from Robert L. Gideon, Judge of the 31st Judicial Circuit and accompanied by a certified copy of an order which reads as follows: Addressed to the State Board of Charities and Corrections, Jefferson City.

'CERTIFIED COPY OF ORDER

State of Missouri )  
County of Taney ) ss May ADJOURNED Term,  
1937 Court of said County,  
on the 18th day of May 1937 the following among  
other proceedings, were had, viz:

WHEREAS, according to Section 14,171 Revised Statutes of Missouri, 1929, it is the duty of the Circuit Court to appoint a suitable person to serve as Probation Officer for the County.

AND WHEREAS, There is at this time no one appointed to serve as said Probation Officer;

AND WHEREAS, Many cases come before the Juvenile Court for hearing and in such cases a Probation Officer is needed to investigate and make the proper reports.

IT IS THEREFORE ORDERED by this Court that Douglas Mahnkey, the Prosecuting Attorney of Taney County, be and is hereby appointed to serve for the years of 1937 and 1938 as Probation Officer of Taney County, Missouri, and that he be paid for such service out of the County Revenue the sum of Three Hundred Dollars per year for such services as provided by aforesaid Section 14,171.

Robert L. Gideon, Judge 31st  
Judicial Circuit.'

"Presumably this appointment was made under the impression that Section 14171 gave the Circuit Judge the right to appoint the Prosecuting Attorney under the clause which reads, 'The Circuit Judge shall designate or appoint an officer of the county, or some other person to serve as Probation Officer.'

"We are asking an opinion as to the legality of this appointment under all points of the law covering duties of Prosecuting Attorneys, salaries and fees of Prosecuting Attorneys, Probation Officer's duty as a representative of the child in a hearing before the court, Probation Officer's duty as a peace officer, etc.

"The following information is desired as it applies (1) to counties over 50,000 (2) counties under 50,000.

Question 1. Can a Prosecuting Attorney be designated by the Circuit Judge as Probation Officer (1) in counties 50,000 or over (Sec. 14136-14158) (2) counties under 50,000 (Sec. 14159-14181).

Question 2. Can a Sheriff or any other elected officer be appointed and serve as Probation Officer?

"These questions apply to the Juvenile Courts of Missouri under Article 8, and Article 9, R. 3. 1929.

"Section 14144 specifies that the Probation Officer 'shall be present at court in order to represent the interests of the child when the case is heard.'

"The same section also specifies 'Probation Officers are hereby vested with all the power and authority of sheriffs to make arrests and perform other duties pertaining to their office.

"It is highly important that an opinion be rendered as early as possible on these points as a guide in the organization of a Juvenile Department under the Social Security Commission."

I. (a)

In an opinion rendered by this department to Mr. Percy W. Gullic, Prosecuting Attorney of Oregon County, under date of June 15, 1937, a copy of which is enclosed, we held that it would be proper for the same person to hold the office of Prosecuting Attorney and the office of Probation Officer in counties of less than 50,000 inhabitants, and further that said person would be entitled to the compensation of both offices.

(b)

It is to be noted, however, that we pointed out in the above opinion that were it not for Section 14171, R. S. Mo. 1929, 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 Section 14175, R. S. Mo. 1929, makes it the duty of every county officer to render the Probation Officer every assistance possible.

Section 14144, R. S. Mo. 1929, provides for the appointment of a Probation Officer in counties of 50,000 or more inhabitants, in part, as follows:

"The circuit court or the criminal court where constituted as a juvenile court under this article shall appoint a discreet person of good character, not under the age of twenty-five years, to serve as probation officer during the pleasure of the court."

In the statutes relating to counties of 50,000 or more inhabitants we find no provision which authorizes the Circuit Judge to appoint "an officer of the county." We do find, however, a provision in Section 14149, R. S. Mo. 1929, making it the duty of the Prosecuting Attorney to render such aid to the Probation Officer "as may be consistent with the duties" of his office, as follows:

"It shall be the duty of all circuit, prosecuting and city attorneys, representing the state or any city in any court held in the counties aforesaid, to give to the probation officer such aid in the performance of his duties as may be consistent with the duties of the office of such attorneys. It shall be the duty of any police officer, constable, sheriff or other authorized person making an arrest of a child under the age of seventeen (17) years, in the counties aforesaid, to give information of that fact at once to the probation officer,

or one of his deputies, and also to furnish such probation officer with all the facts in his possession pertaining to said child, its parents, guardian or other person interested in such child, and also of the nature of the charge upon which such arrest has been made."

In the case of State ex rel. v. Bus, 135 Mo. 1. c. 338, cited in the above opinion, 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."

The very fact that the Prosecuting Attorney may only render such aid "as may be consistent with the duties" of his office, is evidence of the fact that the Legislature considered that there were some duties attached to the office of Prosecuting Attorney that were inconsistent with the duties of a Probation Officer.

This is evident when one considers the language of Section 14144, R. S. Mo. 1929, which declares that the Probation Officer shall be present in court in order to represent the interests of the child, as follows:

"It shall be the duty of the probation officer to make such investigation of

the child as may be required by the court, to be present in court in order to represent the interests of the child when the case is heard, and to furnish to the court such information and assistance as the judge may require, and to take charge of any child before and after trial, as may be directed by the court."

Whereas, in Section 14149, supra, the Prosecuting Attorney is in court "representing the state."

In the case of State ex rel. v. Dunn, 277 Mo. 38, l. c. 44, the court in holding that one may not hold two offices the duties of which are incompatible, said:

"It is elementary law that one may not hold two offices the duties of which are incompatible."

In the case of State ex rel. v. Sword, 196 N. W. 467, the Minnesota Supreme Court in pointing out when public offices are incompatible, said:

"Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one can not discharge with fidelity and propriety the duties of both."

From the foregoing we are of the opinion that a person who holds the office of Prosecuting Attorney may not hold the office of Probation Officer in counties of 50,000 or more inhabitants.

## II.

Section 10 of Article 9 of the Missouri Constitution provides for the election of a Sheriff by the qualified voters of each county, in part, as follows:

"There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff \* \* \*."

The above provision leaves no doubt that the Sheriff is a county officer, and following the reasoning of the enclosed opinion, we are of the opinion that a Sheriff may hold his office and the office of Probation Officer in counties of less than 50,000 inhabitants, and further that said person would be entitled to the compensation of both offices.

### III.

It is true that Section 14149, supra, makes it the duty of a Sheriff in making an arrest of a child to give information of that fact at once to the Probation Officer, and to furnish the latter with all the facts in his possession pertaining to the child, but such duty would not make his office incompatible with that of the office of Probation Officer inasmuch as Section 14144, R. S. Mo. 1929, vests the latter with the same power and authority to make arrests as in the case of a Sheriff, thus:

"Probation officers are hereby vested with all the power and authority of sheriffs to make arrests and perform other duties incident to their office."

We have examined the duties of a Sheriff and a Probation Officer and do not find that same are in conflict, and we are therefore of the opinion that a person who holds the office of Sheriff may also hold the office of Probation Officer in counties of 50,000 or more inhabitants.

Respectfully submitted,

MAX WASSERMAN,  
Assistant Attorney General.

APPROVED:

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

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