SANITY HEARINGS:
PROSECUTING ATTORNEYS: It is improper for a prosecuting attorney to represent, at a sanity hearing held within his county, the person whose sanity is the subject of inquiry; also, it is improper for a prosecuting attorney to represent, in his private capacity, an informant in a sanity hearing, but it is the duty of a prosecuting attorney to represent the state and/or county at all sanity hearings held within his county.

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January 7, 1952

1-9-52

Honorable Roy W. McGhee, Jr.
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "I would appreciate an opinion from your office relative to the duties of the prosecuting attorney, if any, in a sanity hearing conducted by virtue of Section 458.020, R.S.Mo. 1949.
>
> "Is it proper for the prosecuting attorney to act as attorney for either informant or informee in such hearing, and charge a fee for said services?"

In response to our request that you further enlighten us regarding the meaning of the word "informee" as used by you in your letter quoted above, you have written us as follows:

> "The word 'informee' first came before my eyes in either the Missouri Digest, the Mo. R.S.A., or one of the cases cited therein, and I confess I thought it a bit unusual myself.
>
> "In order to clarify matters, let us change it to read 'the alleged insane person.' Your assumption was, of course, correct."

Section 458.020, RSMo 1949, to which you refer above, states:

> "If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury; provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

We would also direct your attention to Section 458.040, RSMo 1949, which states:

> "Whenever any judge of the county court, magistrate, sheriff, coroner or constable shall discover any persons, resident of his county, to be of unsound mind, as in section 458.020 mentioned, it shall be his duty to make application to the probate court for the exercise of its jurisdiction; and thereupon the like proceedings shall be had as in the case of information by unofficial persons."

In response to your question, we would first point out that a sanity hearing, such as is provided for by Section 458.020, supra, is a proceeding by the state, and that it is a civil suit.

In this regard the court, in the case of State vs. Holtkamp, 51 S.W. (2d) 13, l.c. 19, stated:

> "* * * A lunacy proceeding is a civil, as distinguished from a criminal proceeding; yet it is a proceeding in personam by the state; the public is interested in the welfare of the person alleged to be insane. 32 C.J. 627-634; State ex rel. v. Guinotte, 257 Mo. loc. cit. 11, 14, 165 S.W. 718, 51 L.R.A. (N.S.) 1191, Ann. Cas. 1915D, 658. * * *"

In the case of State vs. Skinker, 126 S.W. (2d) 1156, l.c. 1161, the court stated:

> "* * * But it is also true that in these lunacy proceedings, the state, as parens patriae,- the community, -society,- has an interest, both to protect the insane person and to protect the public from possible injury and to the end that such person may not, through mental incapacity, waste his estate and become a charge upon the public. See State ex rel. Paxton v. Guinotte, 257 Mo. 1, 165 S.W. 718, 51 L.R.A., N.S., 1191, Ann. Cas. 1915D, 658. * * *"

In the case of State ex rel. v. Guinotte, 257 Mo. 1, l.c. 11, the court stated:

> "* * * Who are the parties in interest in an inquest de lunatico under our statute? Manifestly, (a) the public at large, that it may not suffer in person or property from the dangerous vagaries or mania of the individual alleged to be of unsound mind, and for that such person by a dissipation of his property, may not become a charge upon the public purse, * * *"

We would next direct your attention to the following portion of Section 56.060, RSMo 1949, which section pertains to the duties of prosecuting attorneys:

> "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, * * *"

We also direct your attention to Sections 56.070, 56.080, and 56.090, RSMo 1949, which state:

> "56.070. To represent county, civil suits etc. - 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."

"56.080. Duties-habeas corpus.- In all criminal cases where any person or persons are brought up on writs of habeas corpus before a judge of any court of record, it shall be the duty of such attorney to attend upon the hearing of such application on behalf of the state."

"56.090. Must be present, when.- No magistrate or judge of a court of record having jurisdiction shall allow any such cases as are alluded to in sections 56.070 and 56.080 to be tried before him, unless the prosecuting attorney shall be present, or some one properly qualified to prosecute for him; and it shall be the duty of any magistrate, before trying such cases as are alluded to in sections 56.070 and 56.080, to give due notice to the prosecuting attorney."

It will be noted that we have held above that a sanity hearing is a civil proceeding by the state. It will also be noted that Section 56.060, supra, requires the prosecuting attorney to commence and prosecute all civil actions in their respective counties in which the county or state may be concerned. And that Section 56.070, supra, requires the prosecuting attorney to prosecute or defend, as the case may require, all civil suits in which the county is interested.

In regard to the above quoted portion of Section 56.070, we may here note that while the section uses the word "county" and omits the word "state", in contradistinction to Section 56.060, which uses the words "state" and "county", that the courts have construed Section 56.070 as referring to the state as well as to the county, although the word "state" is omitted from the section. In the case of State ex rel. v. Wurdeman, 183 Mo. App. 28, the court had occasion to construe Section 1007, R.S. Mo. 1909, which section is identical with Section 56.070, supra. After quoting Section 1007, the court stated, l.c. 34:

> "It is to be observed that section 1007, above copied, makes it the duty of the prosecuting attorney to defend all suits against the State or county, and, indeed, it is conceded in the instant case that, if the mandamus proceeding in the circuit court against the three judges of the county court were a suit against the county, no one could deny or gainsay the right of the prosecuting attorney to control and manage the defense there. * * *"

(Underscoring, ours.)

We feel, too, that our position that when Section 56.070, supra, uses the word "county" it also means "state", in view of the fact that a county is a legal subdivision of the state, being made so by Article VI, Sec. 1, of the Constitution of Missouri, 1945, which states:

> "The existing counties are hereby recognized as legal subdivisions of the state."

It will also be noted that Section 56.090, supra, prohibits any judge of a court of record from permitting any case coming within the provisions of Section 56.070 being heard before him

unless the prosecuting attorney or his representative shall be present. We also note that a probate court is a court of record, being made so by Article V, Section 17, of the Constitution of Missouri.

From all of the above, we feel that it is abundantly clear that it is the duty of the prosecuting attorney to attend and participate in, on behalf of the state and/or county, all civil suits arising in his county, in which the state or county is interested or concerned. That the state is interested and concerned in a sanity hearing has been affirmed by the courts in the cases of State v. Holtkamp, State v. Skinker, and State v. Guinotte, supra.

That the county in which the sanity hearing is held is also interested and concerned, seems obvious. It will be recalled that in the Holtkamp case the court stated that a sanity hearing was one in which "the public is interested"; that the Skinker case stated that a sanity hearing was one in which the "community, society" had an interest; and that the Guinotte case held that the "public at large" was interested in such a case. Certainly the county in which a sanity hearing was held would be included in the embracing words "the public, the community, society, the public at large."

Furthermore, the county in which a sanity hearing is held has a very practical and material interest and concern in such a hearing. Section 458.080, RSMo 1949, states:

> "When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or if that be insufficient, by the county."

This section means that if, at a sanity hearing, the person whose sanity is in question is found to be insane, the costs of such hearing shall be paid by the county if the estate of the insane person shall be found insufficient to pay such costs. And in every sanity hearing that is ever held, the county may be required to pay the costs. The law provides (Section 458.080, supra) that if the person is found to be insane the costs of the hearing shall be paid out of his estate if the estate be sufficient for that purpose, but in no case is it ever positively known, until after the sanity hearing, whether or not the estate is sufficient to pay the costs of the hearing. Section 458.090, RSMo 1949, states:

> "If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this chapter, in which case the costs shall be paid by the county."

This section means, in part, that if a sanity hearing is held at the instigation of a private individual, and that if at the hearing the person whose sanity is the subject of inquiry is found to be sane, that the costs of the hearing shall be paid by the person at whose request the hearing was held. But here again, it is impossible to know, prior to the hearing, whether the person who instigated the hearing has sufficient resources with which to pay the costs of the hearing if they be adjudged against him, because the law nowhere gives the probate judge the power, prior to a sanity hearing, to require the informant to make proof of his financial security or to deposit in escrow a sum sufficient to cover the costs of such a hearing.

Section 458.090 also provides that when the informant is an "officer," which, by Section 458.040, supra, means any judge of the county court, a magistrate, a sheriff, coroner, or constable, and at the hearing the person informed against is found to be sane, that the county shall pay the costs of the hearing.

Reverting again to the Skinker case, supra, we find the court saying that:

> "The state, the county society has an interest * * * to the end that such person may not, through mental incapacity, waste his estate and become a charge upon the public."

And the Guinotte case, supra, affirms, in answer to the question as to who are the parties in interest in a sanity hearing, that one such party manifestly is "the public at large, that it may not suffer in . . . property . . . for that such person by a dissipation of his property may not become a charge upon the public purse." Both cases also affirm the interest of "the public" to the end that it not suffer from the "vagaries" of an insane person, and that the insane person himself may not suffer.

We could further extend this line of reasoning by pointing out that Section 56.070, supra, requires the prosecuting attorney

to give his opinion, in matters of law in which the county is interested, to the county court or to any judge thereof; that if a county judge, acting in his official capacity, is the informant in a sanity hearing, which is a matter of law in which the county is interested, and called upon the prosecuting attorney for his opinion in regard to that particular matter, which he has a right to do and which the prosecuting attorney is obliged to give, and that if the prosecuting attorney were engaged in his private capacity in representing the person whose sanity was the subject of inquiry, that the prosecuting attorney would be put in the anomalous position of having to represent two possibly conflicting interests, i.e., the interest of the county and the interest of the person who was the subject of the sanity hearing. Neither must we lose sight of the obligation of the prosecuting attorney, as stated in Section 56.070, supra, to "represent generally the county in all matters of law."

From the above, we arrive at the conclusion that it is not proper for a prosecuting attorney to represent, at a sanity hearing, the person whose sanity is the subject of inquiry, because it is the duty of the prosecuting attorney to represent the state and/or county in all matters in which the state and/or county is interested and concerned, and because the state and/or county is interested and concerned in a sanity hearing, for the reasons set forth above.

Since it is the duty of a prosecuting attorney to represent the state and/or county at all sanity hearings held within his county, it follows that it would not be proper for a prosecuting attorney to represent a private informant in his, the prosecuting attorney's, private capacity. To the extent, whatever it may be, that a private informant is identified with the state and/or county in a sanity hearing, it may perhaps be said that the prosecuting attorney does represent such private informant. When the informant is any one of the "officers" enumerated above it might more nearly be said that the prosecuting attorney did represent, in his official, not in his private capacity, such informant.

Although we do not feel that a close construction of the law is necessary in order to exclude a prosecuting attorney from privately representing an informant or a person informed against in a sanity hearing since it appears to us to be clear, under the law, that he should not do so, yet we do feel that if a close construction was necessary in order to arrive at

this conclusion that such close construction should be made, since much evil can ensue to the public when a prosecuting attorney departs from the broad duties of his office to represent private interests which are, or which may be, inimical to the interest of the public which the prosecuting attorney is in duty bound to serve.

We will here note that on December 28, 1937, this department rendered an opinion to Honorable Alvin H. Juergensmeyer, Prosecuting Attorney of Warren County, which opinion held: "The prosecuting attorney of a county containing a population of less than 100,000 cannot be appointed by the county court to represent insane persons in a sanity hearing."

At the time when the above opinion was written, sanity hearings were held before the county court. The conclusion of the above opinion was based upon the theory that for a prosecuting attorney to represent an alleged insane person at a sanity hearing would result in a conflict of duties and would therefore be improper. We feel that, although sanity hearings are now held before the probate court, the same reasoning is applicable.

In an opinion rendered by this department on January 16, 1947, to Honorable Gordon J. Massey, Prosecuting Attorney of Christian County, this department held that it was improper for a prosecuting attorney to represent an indigent person at a sanity hearing because the county was liable to pay the costs of such hearing and that therefore the county had an interest in the proceedings.

CONCLUSION

It is the opinion of this department that it is improper for a prosecuting attorney to represent, at a sanity hearing held within his county, the person whose sanity is the subject of inquiry.

It is the further opinion of this department that it is improper for a prosecuting attorney to represent, in his private capacity, an informant in a sanity hearing, but that it is the duty of a prosecuting attorney to represent the state and/or county at all sanity hearings held within his county.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR, Attorney General

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