

OFFICERS: DEPUTY CIRCUIT
CLERK: THIRD CLASS COUNTIES;
MAY BE NOTARY PUBLIC:

Office of deputy circuit clerk, third class county and notary public compatible. One person can hold both offices and perform the duties of each. Deputy circuit clerk of third class county commissioned notary public can perform duties of latter office at any location in his own county he might choose, and is entitled to charge, collect and retain as his own, every fee prescribed by statute for notarial service rendered.



August 17, 1953

Honorable Raymond H. Vogel
Prosecuting Attorney of
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which request reads as follows:

"I would like to have the opinion of your office with regard to the matter set out below.

"May a Deputy Circuit Clerk in a third class county be commissioned a Notary Public? If so, may the Deputy Circuit Clerk perform the duties of a Notary Public in the office of the Circuit Clerk and receive and retain the prescribed fees for such Notary Public work?

"Your early opinion of this matter will be sincerely appreciated."

The general rule prevailing in most jurisdictions with reference to the nature of the office of a clerk of a court of record and the duties of same is set forth in Section 1, Clerks of Courts, page 1211, C. J. S., and reads as follows:

"A clerk of court is an officer of a court of justice who has charge of

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the clerical part of its business, who keeps its records and seal, issues process, enters judgments and orders, gives certified copies from the records and the like. While the clerk of a court belongs to the judicial as distinguished from the executive or legislative branch of government, his office is essentially a ministerial one, and is in no way necessary to the existence of a court.
* * *

Section 483.010, RSMo 1949, provides the qualifications of clerks of all courts of record and reads as follows:

"No person shall be appointed or elected clerk of any court unless he be a citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected three months before the election; and every clerk shall, after his election, reside in the county for which he is clerk."

The election, commission and term of office of circuit clerks is provided by Section 483.015, RSMo 1949, and reads as follows:

"At the general election in the year 1882, and every four years thereafter, except as herein provided, the clerks of all courts of record, except the clerks of the supreme court, the courts of appeals, the probate courts, the magistrate courts, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successor shall be duly elected and qualified, unless sooner removed from office."

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Section 483.080, RSMo 1949, contains the general provisions for the appointment of deputy clerks of courts of record and reads as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

The official records of the Secretary of State's office show that the County of Cape Girardeau is a county of the third class and that the offices of circuit clerk and recorder of deeds are separate. Therefore, the provisions of Section 483.345, RSMo 1949, relating to the appointment of deputies and assistants to the circuit clerk are applicable to the county. Deputies to the circuit clerk of your county would perform such duties as would be assigned to them by the clerk, and as such deputies they should not perform any of the official duties of the recorder of deeds of such county. Section 483.345, RSMo 1949, reads as follows:

"Every circuit clerk in counties of the third class shall be entitled to such number of deputies and assistants to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk to appoint deputies or assistants, shall fix the compensation of such deputies and assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk may, at any time, discharge any deputy or assistant, and may regulate the time of his or her employment and

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the circuit court may at any time modify or rescind its order permitting an appointment to be made."

When one is appointed deputy circuit clerk of a third class county in accordance with the provisions of Section 483.080, supra, and other applicable statutes, the deputy would have the power in the name of the principal to perform the duties of said principal as a public officer. For reasons given above and also for other reasons to be given hereafter, it is believed that when the deputy acts in the place of the principal he would also be a public officer.

The general rule regarding the status of deputies as public officers has been stated in Section 38, pages 16 and 17 of Mechem on Public Officers. Said section reads as follows:

"Whether deputies appointed by public officers are to be regarded as public officers themselves, depends upon the circumstances and method of their appointment. Where such appointment is provided for by law, and a fortiori and where it is required by law, which fixes the powers and duties of such deputies, and where such deputies are required to take the oath of office and to give bond for the performance of their duties, the deputies are usually regarded as public officers. Thus deputy postmasters appointed and qualified according to law, are public officers. So a deputy marshal is an officer of the United States, and deputy sheriffs are recognized by the statutes of most States as independent public officers.

"But where the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer but a mere servant or agent. So a special deputy employed only in a particular case is not a public officer."

Under Section 483.080, supra, deputies of all clerks of courts of record are required to be at least seventeen years of age, must take the same oath of office and possess all the other qualifications of the clerk. In the name of their principals they are authorized to perform any or all of the duties of their principals for whose actions the clerk is liable upon his official

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bond.

The appointment of a deputy circuit clerk is regulated by Section 483.345, supra, and such appointment is required to be approved by the circuit judge. While the order appointing the deputy fixes his term and the amount of compensation, such deputy may be discharged at any time by the clerk, yet, since the statutes provide for the appointment, how the compensation is fixed and the method of discharge, and also in view of the provisions of Section 483.080 and other sections noted above, it appears that in the enactment of said statutes, it was the legislative intent that deputy circuit clerks are to be regarded as public officers as much so as clerks, and that such deputies were never intended to occupy the status of servants of their principals, otherwise deputies would not have been granted the power to perform the duties of public officials.

This brings us to that point in our discussion of the subject matter of the opinion request when it is necessary to consider the legal status of a notary public, and that is, whether a notary is, or is not a public officer.

In the case of *Ghast v. St. Louis Transit Company*, 115 Mo. App. 403, the court quoted the definition of notary public given in *Black's Law Dictionary*. At l. c. 408, the court said:

"* * * a public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents in order to give them credit and authenticity in foreign jurisdictions."

Again the following definition of a notary public is given in Section 1, page 609, Volume 66, C.J.S., and reads as follows:

"A notary or notary public is a public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions, to take acknowledgments of deeds and other conveyances, and certify them, and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, and noting of foreign drafts, and marine protests in cases of loss or damage."

From these definitions it is readily seen that a notary public is a public officer and since it is our belief that a deputy circuit clerk is also a public officer, we must give further consideration and discussion to that part of the inquiry calling for a determination as to whether a deputy circuit clerk of a third class county may be commissioned a notary public. The answer to this inquiry depends upon the answer to the question as to whether these two public offices could, or could not be held by the same person, and whether the duties of either would so conflict with the other as to render the two incompatible and prohibit one person from holding both at the same time.

From the foregoing, it may be said that the various statutes require certain duties to be performed by the circuit clerk, and while these statutes are numerous, we find it unnecessary to quote all of them so that an outline of the duties of that office might be given. But we do wish to call attention to the nature of the general duties of the circuit clerk, even though we may repeat something stated above. The circuit clerk is an officer of the court and the clerk has charge of all the clerical duties of the circuit court, such as keeping court records and the seal. As a part of his official duties he is required to file petitions in civil cases, indictments or informations in criminal cases, and various legal documents which the statutes require to be filed by him. The clerk is also required to issue civil and criminal process, enter judgments, orders or other proceedings of record, and, when so required he must furnish certified copies of court orders in his office. He is also charged with the duty of collecting and accounting for every fee which the statute require of him, and for any failure so to do he and the sureties on his official bond may be liable. Although the clerk is legally authorized to administer oaths and take acknowledgments of instruments in writing, such duties are merely incidental to his most important or primary duties of being a clerical assistant to the circuit court.

It is true that a notary public may legally perform some of the duties which the circuit clerk or his deputy may be called upon to perform, for example, administering oaths or taking acknowledgments to certain written instruments, but from the definitions previously given of a notary public, it is obvious that the duties of the two offices of circuit clerk and notary public are basically different and that possibly the greatest difference between them is that the notary has nothing to do with keeping the circuit court records, whereas, the keeping of such records is the principle duty of the circuit clerk. In this case we wish to point out that a deputy circuit clerk who was also a notary public when acting for his principal acts only as a deputy circuit clerk and cannot perform any of the duties of that office in the capacity of notary public. A notary might legally perform some duties required of the deputy circuit clerk or vice versa, as when the deputy circuit

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clerk administers oaths or takes acknowledgments of written instruments, but when the deputy circuit clerk as such, performs the duties ordinarily performed by a notary, he must charge, collect and account for, and turn over every fee prescribed by statute for such services to the county treasurer.

When the office of deputy clerk and notary public are held by the same person at the same time, the functions of each office are to be exercised independently of the other and such person must be careful to keep his notarial duties from interfering in any manner with his duties as deputy circuit clerk, for the duties of the latter office must be given first consideration in every instance.

Therefore, it is our thought that a deputy circuit clerk of a third class county, if possessing the necessary qualifications of a notary public provided by Section 486.010, RSMo 1949, may be commissioned as a notary public since there is no incompatibility between the offices of deputy circuit clerk and notary public.

It is our further thought that a deputy circuit clerk, when commissioned as a notary public for Cape Girardeau County, Missouri, may perform the duties of notary public at the office of the circuit clerk of that county the same as at any other location in that or any adjoining county and may receive and retain the fees prescribed by statute for notary public work, and is not required under any statute to turn over such fees to the treasurer of Cape Girardeau County.

CONCLUSION

It is therefore the opinion of this department that the offices of deputy circuit clerk of a third class county and notary public are compatible and that one person would be permitted to hold both offices and to perform the duties of each. A deputy circuit clerk of a third class county commissioned as notary public could perform the duties of the latter office at any location he might choose within the county for which he was commissioned and would be entitled to charge, collect and retain as his own, every fee prescribed by statute for notarial services rendered.

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

Very truly yours,

JOHN M. DALTON
Attorney General