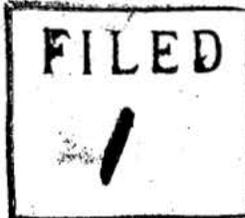


PROSECUTING ATTORNEY, )  
VACANCY IN OFFICE: )

A prosecuting attorney in one county  
may serve also as prosecuting attorney in  
another county under appointment to fill  
a vacancy.

May 2, 1952

5/7/52



Honorable Ray Adams  
Representative of Reynolds County  
House of Representatives  
Jefferson City, Missouri

Dear Mr. Adams:

We have given careful consideration to your request for an opinion contained in your letter in which you wanted to know if a prosecuting attorney of one county could legally hold the office of prosecuting attorney in another county under appointment to fill a vacancy/when no resident lawyer could or would accept the appointment.

The qualifications for a person elected to the office of prosecuting attorney are contained in Section 56.010, RSMo 1949, which provides, among other things, that he must have been "a bona fide resident of the county in which he seeks election for twelve months next preceding the date" of the election at which he is a candidate.

There is another statute, however, which applies to the appointment of a person to fill a vacancy in the office of prosecuting attorney. This is Section 105.050, RSMo 1949, which is as follows:

"If any vacancy shall happen from any cause in the office of the attorney general, circuit attorney, prosecuting attorney or assistant prosecuting attorney, the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same until the next regular election for attorney general, prosecuting attorney

Honorable Ray Adams

or assistant prosecuting attorney, as the case may be; provided, in the case of a vacancy in the office of prosecuting attorney, if there is no qualified person in the county who can or will accept such appointment, then the governor may appoint any person who possesses all the qualifications set forth in section 56.010, RSMo 1949, except the qualification as to residence."

This settles the question as to residence, and the only remaining matter for consideration is whether or not the same person may hold the two offices at the same time. There is a common law rule which holds that a person cannot serve in two or more offices at the same time when the duties and functions of the offices are inconsistent or incompatible.

The high courts of this state have in numerous cases defined this principle. The St. Louis Court of Appeals, in *Bruce v. City of St. Louis*, 217 S.W. (2d) 744, 1.c. 748, said:

"The limitation at common law upon the holding of two or more offices at one and the same time extends no farther than to prohibit the holding of incompatible offices. Any further inhibition must be constitutional or legislative. \* \* \*"

The two offices of prosecuting attorney could not by any stretch of the imagination be considered incompatible, for the duties and functions are exactly the same in the two counties. Moreover, there is no constitutional or statutory inhibition in Missouri to keep the same person from holding the two offices at the same time.

#### CONCLUSION

It is the opinion of this office that a prosecuting

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attorney in one county may serve also as prosecuting attorney in another county under appointment to fill a vacancy when there is no qualified person in the county who can or will accept such appointment.

Respectfully submitted,

B. A. TAYLOR  
Assistant Attorney General

APPROVED:



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J. E. TAYLOR  
Attorney General

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