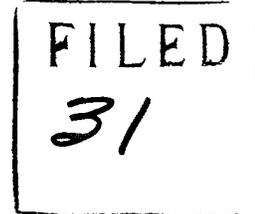


PROSECUTING ATTORNEYS:

Special prosecuting attorney to
be appointed by court having
jurisdiction of criminal case.

April 24, 1953



Honorable Patrick O. Freeman, Jr.
Attorney at Law
Thayer, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, approved by the Honorable Percy W. Gullie, Prosecuting Attorney, Oregon County, Missouri, and reading as follows:

"Hon. T. W. Mesara, Magistrate of Oregon County, Missouri, has requested that I write to your office requesting an opinion on the following matter.

"There is now pending in the Circuit Court of Oregon County, Missouri, two civil actions brought by a plaintiff, Mary Clark, against defendant, William Cantrell, both residents of Oregon County, Missouri. These actions are in the nature of replevin and money paid by mistake as a result of an automobile sale transaction.

"Subsequent to the filing of these civil actions by the plaintiff, Mary Clark, the defendant, William Cantrell, filed a criminal action in the Magistrate Court of Oregon County complaining that Mary Clark had displayed a dangerous weapon in his presence in a threatening manner, etc. Upon this criminal action being filed the Hon. Percy Gullie, prosecuting attorney of Oregon County, Missouri, disqualified himself on the grounds

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that he represented the defendant, Mary Clark, in a civil action and on the grounds that the civil and criminal actions have resulted from virtually the same transaction and that evidence in both the civil and criminal actions would intertwine.

"Upon Mr. Gullic disqualifying himself the Hon. Gordon Dorris, Judge of the Oregon County Circuit Court, appointed me as special prosecutor to prosecute Mary Clark on behalf of the State of Missouri. The case is further complicated by the fact that I represent Mr. Bill Cantrell, the prosecuting witness, in the same civil actions upon which Mr. Gullic disqualified himself.

"It is my opinion that I am also interested in the same action and it would be inconsistent for me as well as Mr. Gullic to prosecute in the criminal case.

"The preliminary hearing which was set by the magistrate court for February 20th was continued until an opinion from your office could be obtained as to who is the proper person to appoint such special prosecutor and also whether or not Mr. Gullic and I would be acting inconsistent in prosecuting the criminal case.

"It is my opinion that your office is the proper source to handle the prosecuting of this case on behalf of the State of Missouri, or some disinterested attorney.

"We would appreciate receiving an opinion at your earliest convenience."

Your inquiry resolves itself into two questions:

(1) Where is the appointing power for the appointment of a special prosecuting attorney when the regular prosecuting attorney is disqualified to act in a criminal case; and

(2) Are you disqualified from serving as a special prosecuting attorney under the facts outlined in your letter of inquiry.

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With respect to the first question you have proposed, we direct your attention to Section 56.100, RSMo 1949, reading as follows:

"If interested in case, court to appoint substitute, -- If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."
(Emphasis ours.)

The power of appointment granted by this statute to the court having jurisdiction of a criminal cause is a continuing power. Therefore, if after having been appointed as special prosecuting attorney, as was done in your case, it is determined that such special prosecuting attorney is disqualified from acting therein, the same court retains the power to appoint another and different special prosecuting attorney. "Court," as used in the statute quoted, may mean either the magistrate court or the circuit court. In the particular instance referred to in your letter of inquiry it is to be construed to refer to the Circuit Court of Oregon County, Missouri, as the crime which is mentioned in your letter of inquiry, that is to say, the display of a dangerous and deadly weapon in a threatening manner, is made a felony under the provisions of Section 564.610, RSMo 1949. Original jurisdiction in felony cases has been conferred upon Circuit Courts in the respective counties by Article V, Section 14, Constitution of Missouri, 1945, and Section 478.070, RSMo 1949.

It is also noted in your letter of inquiry that there is some thought the Attorney General of the State of Missouri might or should assist the special prosecuting attorney. It is true that the Attorney General is authorized to assist a prosecuting attorney even without a directive from the Governor. To this effect, see State v. Hayes, 23 Mo. 287, l.c. 293, and State v. Naylor 40 S.W.2d 1079. However, it is the policy of this office to refrain from doing so in the absence of such a directive from the Governor. We believe the proper procedure in each instance to be followed is that outlined by Section 27.030, RSMo 1949, reading as follows:

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"To aid prosecuting and circuit attorneys, when. -- When directed by the governor, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed by the trial court, he may sign indictments in lieu of the prosecuting attorney."

(Emphasis ours.)

Under this statute upon the request to the Governor of Missouri for assistance in the trial of the case, the Governor would direct the Attorney General to carry out his statutory duties as outlined above.

From the foregoing we reach the view that the Circuit Court for Oregon County, Missouri, is the proper appointing authority to name a special prosecuting attorney to act in the case based upon the facts outlined in your letter of inquiry.

We do not express any opinion with respect to the second question you have proposed, as matters of that nature are peculiarly within the province of the Bar Administration Committee of the State of Missouri. Your inquiry in that regard should be directed to the Honorable Fred B. Hulse, General Chairman, Bar Committee of Missouri, Sedalia, Missouri.

CONCLUSION

In the premises, we are of the opinion that the power to appoint a special prosecuting attorney to act in a felony case pending or to be tried in the Circuit Court for Oregon County, Missouri, is vested in such court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON
Attorney General