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OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY

February 11, 1976

OPINION LETTER NO. 27

Honorable James F. McHenry
Prosecuting Attorney
Cole County Courthouse
Jefferson City, Missouri 65101

Dear Mr. McHenry:

This is in response to your request for an opinion from this office as follows:

"a. Are there any public disclosure or reporting requirements for a committee or not-for-profit corporation which is formed for the purpose of promoting an amendment to the Constitution of Missouri through the initiative process, and which does not promote or expend funds to promote any political party or candidate for office, and, if so, what are they? In this connection it may be assumed that the committee or corporation would not have any designated poll watchers or canvassers at the election.

"b. May a corporation, bank and/or labor organization lawfully make contributions to such a committee or corporation?

"c. In view of the pending constitutional challenges in court to the Campaign Finance and Disclosure Law (Proposition No. 1), should law enforcement officials attempt to enforce the provisions of law 'repealed' by the terms of Proposition No. 1 prohibiting corporate contributions to committees promoting initiative

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drives and imposing disclosure and reporting requirements upon such committees promoting initiative drives?

"A number of groups are proposing amendments to the Constitution by the initiative process and some of those groups are proposing offices and operations in Cole County. Such groups propose drives to secure voter signatures on initiative petitions, and campaigns to secure voter approval at an election if such a proposal is placed on the ballot. Such groups are not connected with any political party nor do they support any individual candidates. Such groups contemplate raising funds from individuals, and also, if such may be lawfully done, from corporations, banks or labor organizations."

You also state in the brief you have submitted with your opinion request that:

"It is understood that various questions have been raised relative to the constitutionality of Proposition No. 1 and that the constitutionality thereof is now subject to pending court action. If Proposition No. 1 is unconstitutional in whole or in part, would this have the effect of reinstating the law presumably repealed? It is noted that Section 18 of Proposition No. 1 is a 'severability' provision. Would this provision have the effect of leaving the prior law in a 'repealed' state in the event of a determination of unconstitutionality of the new provisions of Proposition No. 1? The guidance of the Attorney General is requested as to the position which should be taken by Missouri law enforcement officials at present relative to 'enforcing' the provisions of 'law' above noted which preclude contributions by corporations to initiative drives and impose reporting and disclosure requirements with respect thereto, which presumably have been repealed by Proposition No. 1, but which might be considered reinstated in the event Proposition No. 1 is declared unconstitutional by the courts."

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In response to the first two questions you have submitted, we are enclosing herewith Opinion Letter No. 372 issued December 30, 1974, to Donald L. Manford, in which we stated that, in the absence of exceptional circumstances, this office should defer answering questions concerning the interpretation and requirements of Proposition No. 1 since the Missouri Elections Commission is authorized by statute to issue, upon request, opinions upon the requirements of this act and such questions should be submitted to the Commission.

We believe your primary question concerns your duty and liability as a public official in enforcing the provisions of Proposition No. 1 at the present time since you allege that questions have been raised as to the constitutionality of Proposition No. 1 in whole or in part.

Every reasonable presumption is made in favor of the constitutionality of a statute. Varble v. Whitecotton, 190 S.W.2d 244 (Mo. Banc 1945). In 16 C.J.S. Constitutional Law § 82 p. 251, it is stated that as a general rule a public official whose rights are not adversely and injuriously affected by the operation of a statute or ordinance, or the particular feature of it complained of, may not raise the question of its constitutionality.

Concerning the acts done by public officials under a statute later declared to be unconstitutional, the rule is stated in 16 C.J.S. Constitutional Law § 101 p. 480 as follows:

". . . ministerial officers are authorized to treat every act of the legislature as prima facie valid, and have been held not liable for any acts committed under an unconstitutional statute because of its unconstitutionality. Also, the rule that an unconstitutional law is a nullity cannot be applied to work hardship and impose liability on a public officer who, in performance of his duty, has acted in good faith in reliance on the validity of a statute before any court has declared it invalid; . . ."

In State ex rel. Williamson v. County Court of Barry County, 363 S.W.2d 691 (Mo. 1963), the court stated that ordinarily a public official may not question the constitutionality of a statute as a defense to mandamus to compel him to perform a ministerial duty.

We have been unable to find any appellate court decisions in this state directly in point, and we are relying primarily on theory.

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In Bricker v. Sims, 259 S.W.2d 661 (Tenn. 1953), the court held that even if a city ordinance was unconstitutional, the arresting officers could not be held responsible in damages since they were entitled to act upon the assumption that all public laws and ordinances of municipalities are constitutional. Without deciding whether the ordinance in question was void, the court stated that every act of the legislature is presumptively constitutional until judicially declared otherwise and the oath of office "to obey the Constitution" means to obey the Constitution, not as the officer decides, but as judicially determined. In discussing the general rule that officers are not permitted to question the validity of a statute or city ordinance as a general rule, the court stated, l.c. 664:

"It is certainly true that, under the great weight of authority as established by our own court, the presumption in favor of the constitutionality of a statute is so binding that the public and individuals are bound to treat it as valid. Hence it follows that the public and individuals are compelled, by judicial construction, to assume toward a legislative enactment, precisely the same attitude, whether it be constitutional or unconstitutional."

In Feuchter v. City of St. Louis, 210 S.W.2d 21 (Mo. 1948) concerning the liability of public officials in enforcing the law, the court stated, l.c. 25:

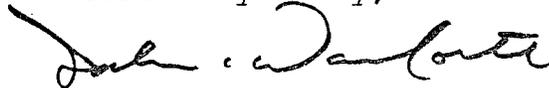
". . . Public officers are not liable for an error of judgment, in line of their official duty and within the scope of their authority, resulting in a wrong decision on questions, such as the one in this case, involving the determination of facts and the application thereto of provisions of law. [43 Am.Jur. 84; Secs. 272-275; State ex rel. Funk v. Turner, 328 Mo. 604, 42 S.W.2d 594; State ex rel. Songer v. Fidelity & Deposit Co., Mo.Sup., 53 S.W.2d 1036, 85 A.L.R. 955; Pike v. Megoun, 44 Mo. 491.] We hold that defendants cannot be held to any personal liability for leaving to the Courts the final decision of the question in this case, upon which there could reasonably have been a difference of opinion, before making substantial payments to plaintiff out of public funds. The city is not

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liable in any event because the defendants were acting as public officers in a governmental capacity. [State ex rel. Gallagher v. Kansas City, 319 Mo. 705, 7 S.W.2d 357, 59 A.L.R. 95.] . . ."

It is our opinion that Proposition No. 1, adopted by the voters by initiative petition and which became effective January 1, 1975, is presumptively constitutional and valid at the present and remains so until declared unconstitutional by an appellate court in this state.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op.Ltr.No. 372
12-30-74, Manford