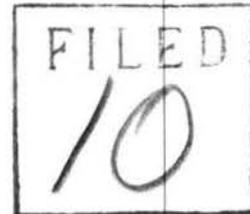


PROSECUTING ATTORNEY;
INSANITY HEARING:

Prosecuting Attorney should not accept appointment by the county court as attorney for an alleged insane person in an insanity hearing before the county court.

March 4, 1940

Hon. Fred C. Bollow
Prosecuting Attorney
Shelby County
Shelbina, Missouri



Dear Sir:

This is in reply to your letter dated February 22, 1940, in which, in the following terms, you request our opinion:

"By virtue of the provisions of Section 8646 found at page 511 of the Session Laws of 1937 the duty devolves upon the county court in a sanity hearing held before it to appoint an attorney for the alleged insane person and allow to him a reasonable attorney fee for the services rendered, unless an attorney appear for the alleged insane person at such hearing. Since, as a matter of actual fact the county court has jurisdiction solely of indigent insane, all insane persons with property have to pass through the probate court, no attorney ever appears for the alleged insane person and the court must appoint one. Is there anything improper in the county court appointing the prosecuting attorney to appear for and represent the alleged insane person and allowing to him a fee for such appearance? I do not find that it is anywhere the duty of the

prosecuting attorney to represent the informant and I have felt that it would be perfectly proper for the court to appoint the prosecutor to represent the alleged insane person and allow and pay to him a fee. However, I do not wish to accept any such fee until such time as your office has passed upon the propriety of such conduct."

Section 8646 R. S. Missouri, 1929, as amended Laws of Missouri, 1937, page 509, section 1, Mo. Stat. Ann. page 7745, provides:

"At the time appointed, unless the investigation shall be adjourned over to some other time, the court shall cause the witnesses in attendance to be examined before themselves, or a jury, if one be ordered for the purpose, duly chosen and impaneled, according to the practice of the court. At least one of the witnesses examined shall be a reputable physician. If no licensed attorney appears for the alleged insane person at such hearing, the court shall appoint an attorney to represent such person in such proceeding and shall allow a reasonable attorney fee for the services rendered, same to be taxed as costs in such proceeding."

Section 11322 R. S. Missouri, 1929, Mo. Stat. Ann. page 604, provides:

"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."

Said Section 11322, supra, appears to apply only to criminal cases. But it is expressive of a policy of the law that a prosecuting attorney should not accept employment as counsel in any case where such employment is inconsistent with the duties of his office, and is cited for that purpose. Further, universal recognition is accorded to the principle that generally a lawyer should not represent conflicting interests. An insane person entitled to due process of law, (*Ussery v. Haynes*, 127 S. W. (2d) 410, 414) would be incapable of consenting to his attorney's representing conflicting interests.

Section 6, Canons of Ethics of the American Bar Association, adopted as rule 35 of the Supreme Court of Missouri, 7 Houts, page 338, in part provides:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interest when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client

with respect to which confidence has been reported."

What are the duties of the prosecuting attorney to the county, in connection with the insanity hearing provided for by Sections 8636 to 8649, inclusive, R. S. Mo., 1929, as amended?

Section 11318 R. S. Mo. 1929, Mo. Stat. Ann. page 602, provides that the prosecuting attorney --

"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, * * * 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, * * * * *"

In Ussery v. Haynes, 127 SW (2d) 1.c. 415, the functions of the county court in the insanity hearing were described by the Supreme Court as follows:

"* * * The county courts are courts of record and, as pointed out above, to them alone is committed jurisdiction to commit persons to the state hospitals for the insane at the expense of their respective counties. In doing that they have authority and it is necessary to determine whether or not the person in question is insane. In exercising this jurisdiction they act judicially. * * *"

The county court must decide matters of law, such as,

for example the question, who are "insane poor" and who are "entitled to admission" (Sec. 8636 R. S. Mo. 1929, as amended Laws 1935, page 387, Sec. 1, Mo. Stat. Ann. page 7741). The function of committing a person to an insane asylum is clearly a legal proceeding. It follows that the insanity hearing and the court's functions constitute a matter of law in which the prosecuting attorney must "represent generally the county," as provided by Sec. 11318, supra. The county is interested in the subject matter of an insanity hearing. In State ex rel v. Guinotte, 257 Mo. 1, 1.c. 11, 165 SW 718, 1.c. 721 (51 L.R.A. (N.S) 1191 Ann. Cas. 1915 D, 658), the court in part said:

"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, * * * (b) the person whose mind is under suspicion, the alleged crazy person, * * * * ."

In Painter v. Painter, 228 S. W. 538, 1.c. 540, the Springfield Court of Appeals said, regarding an insanity hearing:

"From this we see that under the rule declared the proper parties who were interested in the proceeding had in the county court of Lawrence county were the defendant and the public at large, represented and protected by the county court. A writ of certiorari would not only have tested the same question sought to be tried here, but would have brought into court those parties most interested in the proceeding. * * *"

Regarding pecuniary interest, in State ex rel v. Wurdeman, 183 Mo. App. 28 1.c. 36, 37, 166 S. W. 348, the St. Louis Court of Appeals ruled:

"* * * While section 1007, in so far as its consideration here is essential, applies more particularly to cases in which the county is concerned and suits against it, section 1008 imposes a duty on the prosecuting attorney in respect of all civil suits in which the county is 'interested.'

"It is clear that the county is interested in a civil suit in mandamus directed against the judges of the county court by which it is sought to compel them, through utilizing the franchises of their office, to issue a dramshop license in favor of any citizen, authorizing him to sell intoxicating liquors in the county. In respect of this matter, it is to be said the judges of the county court, as individuals, apart from their office and the franchises which inhere in it could confer no privilege under the law, and it is only because of their office as county judges that they may be compelled to act thereon at all, and this is true though the writ runs against them as judges of the county court, rather than against the office of the county court eo nomine. The idea is to compel the judges, as individuals in whose hands the franchises pertaining to the office are accumulated, to exercise the powers of the office in acting upon the application for a dramshop license and thus proceed in the performance of a public duty affixed by statute. To say that St. Louis county is not even interested in such a proceeding involves but a partial view of the subject-matter. Under our statutes the county is

pecuniarily interested in the matter of dramshop licenses, for a portion of the revenue received therefor goes into its treasury."

(Section 1008 R. S. Missouri, 1909, above referred to was to the same effect as Section 11318, R. S. Mo. 1929). In the Wurdeman case, supra, the county treasury was affected by the receipt of funds, and in this case the county treasury is affected by the withdrawal of funds. By analogy the county is pecuniarily interested in the matter of committing persons to the insane asylum, because by such proceeding money is paid out of the county treasury as provided by Section 8636, supra. Moreover, the county is interested in protecting the safety of the persons of its citizens from harm by acts of violent or dangerously insane persons, by temporary commitment to the county jail after a hearing (Sec. 8648 R. S. Mo. 1929) as amended, Laws of 1937, page 509, Sec. 1, Mo. Stat. Ann., page 7745).

Because the hearing is a "matter of law," and because the county is "interested", the prosecuting attorney must give his opinion to the county court or a judge thereof, as provided by Section 11318, supra. Being "interested" the county is "concerned", and the following provisions of Sec. 11321 R. S. Mo., 1929, Mo. Stat. Ann. page 604 are applicable:

"The prosecuting attorney shall, without fee, give his opinion to any justice of the peace, and to any county court, or to any judge thereof, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before such court or officer."

Other litigation may grow out of such hearing. On the part of the alleged insane person, certiorari will lie from an adjudication of insanity. The county is an interested party in such a proceeding (Painter v. Painter,

supra.) In such a civil suit it would be the duty of the prosecuting attorney to defend for the county as provided by Sec. 11318, supra.

On the part of the person who instituted the inquiry into insanity (Sec. 8643 R. S. 1929 as amended Laws 1937, page 509, sec. 1, Mo. Stat. Ann. page 7744) mandamus will lie to compel the county court to remove an insane poor person to the asylum and pay the expenses of his confinement (State ex rel v. County, 80 Mo. 80). This also is a civil suit. The county would be "interested" for the reasons already stated regarding the original hearing and proceeding on a writ of certiorari. It would be the duty of the prosecuting attorney to defend for the county as provided by Sec. 11318, supra.

What would be the duties of the prosecuting attorney to the alleged insane person if he represented such alleged insane person? At the hearing it would be his duty to give his opinion to such person, to develop all evidence which would bear on the issue of insanity, and to deny or admit insanity. Possibly, at such hearing, the attorney might deny insanity for the alleged insane person and assert insanity for the county. Conceivably for the prosecuting attorney to contest the issue of insanity at the hearing on behalf of an alleged insane person would be inimical to the county duty to protect citizens from harm by act of a violently and dangerously insane person.

If, after hearing, the prosecuting attorney's private client was adjudged insane and ordered committed to the asylum, and then applied for a writ of certiorari, the prosecuting attorney officially would be required to defend for the county against the person whom he had represented at the hearing.

From all the foregoing, it is clear that the official duties of the prosecuting attorney to the county in connection with the hearing would conflict and be inconsistent with his duties as attorney for the alleged insane person, and that the interests of the alleged person and the interests of the county may readily be inconsistent and in conflict with each other.

Hon. Fred C. Bellow

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March 4, 1940

CONCLUSION.

It is our opinion that the prosecuting attorney should not accept appointment by the county court as attorney for an alleged insane person in an insanity hearing before the county court.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

EH:RW