

COUNTY COURTS:  
EMPLOYMENT OF  
SPECIAL COUNSEL:

County courts may employ special counsel to represent the county in civil matters only when the prosecuting attorney refuses to act or is interested, or shall have been employed as special counsel and when such employment is inconsistent with the duties of the office or if the prosecuting attorney is related to the defendant.

August 29, 1941

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Honorable Phil H. Cook  
Prosecuting Attorney  
Lafayette County  
Lexington, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement of facts:

"On Wednesday, August 13 I was in your office at which time I talked to Mr. Burton about the possibility of the county court retaining special counsel to assist the prosecuting attorney in suits for the collection of shortages as shown by the State Auditor's report filed in this county on August 12, 1941. Nothing definite was decided at that time. Since returning home I have attempted to check the law on this matter and the latest case that I am able to find ruling directly on this point is 162 Missouri 580. I also find that the right of the court to hire special counsel was conceded in the case of Morrow vs Pike County, 189 Missouri 610.

"Will you please furnish me with an opinion as to whether or not the county court has the right to hire special counsel to assist the prosecuting Attorney in a suit on an official bond to recover money belonging to the county, the road funds, school funds, bond funds, etc."

The statutory duties of the prosecuting attorney,

with reference to representing counties in civil and criminal matters, are stated in Sections 12942, 12944 and 12948, R. S. Missouri 1939, as follows:

"Sec. 12942. The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over 300,000 inhabitants, by the city, all necessary abstracts of record and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

"Sec. 12944. He 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, investigate all claims against the county, draw all contracts relating to the

business of the county, 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, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto; Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

"Sec. 12948. 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."

In your request you cite some cases which have held that the county court may employ special counsel to represent the county in civil matters. Upon an examination of these cases, I find that those opinions were based upon a statute which was enacted in 1873, Laws of Missouri, 1873, page 18. Section 5 of said act, which is pertinent to your question, reads as follows:

"Sec. 5. The county court of any county in this state may employ, on such terms as said court shall deem proper, by an order made of record, one or more attorneys-at-law to aid and assist the prosecuting attorney of such county in any civil business, when, in the judgment of such court, the interest of the county requires such assistance."

At the Revision Session of the General Assembly in 1879, the law relating to prosecuting and circuit attorneys was reenacted under what was Article 2 of Chapter 9, R. S. Missouri 1879, and the foregoing 1873 law was left out of this article. Therefore, the cases which you cite are no longer authority because the opinions in those cases were based upon the provisions of the Act of 1873, supra. Regarding the repeal of this Act of 1873, the Supreme Court in *Butler County v. Sullivan County*, 108 Mo. 630, after discussing the statute pertaining to the employment of special counsel in tax suits, the court went into the question of whether or not there was any other statute authorizing employment of special counsel by the county court. At l. c. 638, the court said:

"This state, by law, has made ample provision for the collection of its revenue for all purposes. In the exercise of its prerogative, it makes use of certain officials, designated as county officers, to whom are assigned specific duties, and, among others, the county courts. But this statute confers no power upon the county court to cast upon the county the burden or cost of such collection. Nor is there anywhere in the statutes to be found an act conferring such authority. As conferring such authority, we are cited to an act, approved March 11, 1873, amending an act approved March 9, 1872, entitled 'An act to abolish the offices of circuit and county attorneys by adding a new section, to be denominated section 5.'

"That amendment reads as follows:

"Sec. 5. The county court of any county in this state may employ on such terms as said court shall deem proper by an order, made of record, one or more attorneys-at-law to aid and assist the prosecuting attorney of such county in any civil business, when, in the judgment of such court, the interest of the county requires such assistance.' The act of 1872, to which this section was amendatory, was revised and amended in 1879 (R. S. 1879, art. 2, ch. 9), and section 5 of that act omitted, and thereby the same was repealed. \* \* \* "

This opinion has not been criticized or overruled but has been recognized by the court in later decisions. *Morrow v. Pike County*, 189 Mo. 610, 620; *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614. In the *Buchanan County case*, supra, l. c. 633, in speaking of the duties of the prosecuting attorney and county court with reference to civil and criminal matters, the court said:

"It is the duty of prosecuting attorneys to commence and prosecute all civil and criminal actions in their respective counties, in which the county or State may be concerned. (Secs. 736 and 738, R. S. 1919.) The county court is the fiscal agent of the county and is charged with the duty and vested with the power to enforce the collection of money due the county, to order suit to be brought on bond of any delinquent and require the prosecuting attorney for the county to commence and prosecute the same. (Sec. 9560, R. S. 1919.) We are of the opinion that when the prosecuting attorney refused to perform his duty, as in this instance, the county court was not shorn of its power to act in the discharge of its duties in the premises, nor required to supinely abdicate its functions. The servant is not greater than his master. The county court was empowered by the statute to order the

suit to be brought and to require the prosecuting attorney for the county to commence and prosecute the action. The refusal of the prosecuting attorney to obey the order of the county court created an emergency. The suit must be brought or the county lose a large amount of its revenue. In this emergency we have no doubt the county court had the implied power to employ other counsel to bring the suit; otherwise it would have failed in the discharge of a duty imposed upon it by the statute."

The proviso clause in Section 12944, supra, very plainly shows that the lawmakers intended that special counsel be employed in cases where swamp lands were involved. Under the condition stated in Section 12948, supra, the county court may employ special counsel.

The Buchanan County case, referred to hereinabove, recognizes the rule that the county court, under the conditions and circumstances set out in said Section 12948, may employ special counsel in civil matters.

The cases which we have found on this question have not dealt with the authority that the county court might have under the provisions of Section 36 of Article VI of the Constitution of Missouri to employ special counsel. On the contrary, the courts seem to hold that this authority is derived solely from the statutes. Said Section 36 reads as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

#### CONCLUSION

From the foregoing it is the opinion of this depart-

Hon. Phil H. Cook

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ment that the county court may not employ special counsel to represent the county in civil matters except in matters pertaining to swamp lands and except in cases where the prosecuting attorney is interested or has been employed as counsel in a case where such employment would be inconsistent with the duties of his office or in cases where the prosecuting attorney is related to parties whose interests are in conflict with those of the county and in cases where the prosecuting attorney refuses to act.

Respectfully submitted

TYRE W. BURTON  
Assistant Attorney General

APPROVED:

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VANE C. THURLO  
(Acting) Attorney General

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