

PROSECUTING ATTORNEY:

Prosecuting attorney of second class county has authority and duty to appear on behalf of county officers, employees and board members who are sued in an action testing county's authority.

OPINION NO. 93

February 20, 1970

Honorable John Crow  
Prosecuting Attorney  
Greene County Court House  
Springfield, Missouri 65802



Dear Mr. Crow:

This official opinion is issued pursuant to your request in which you advise us that a suit has been filed against a county of the second class, the judges of the county court, the county treasurer, the members of the county planning and zoning commission, and two individuals employed as building inspectors. The suit seeks injunctive and declaratory relief with regard to county zoning ordinances and their enforcement, and ancillary relief. You ask as to your authority and duty with regard to the representation of the individual defendants in the suit.

Section 56.060, RSMo 1959, provides that the prosecuting attorney of a county not having a county counselor is obliged to:

" . . . commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, . . . "

Section 56.070, provides that the prosecuting attorney of such a county is to " . . . represent generally the county in all matters of law, . . . "

In the case you describe the county is named as a defendant. The interest of the individual defendants appears to be indistinguishable from that of the county. Under these circumstances it is manifest that the prosecuting attorney should enter his

Honorable John Crow

appearance on behalf of the individuals in addition to representing the county. The county's interest in the action might well be prejudiced if the individuals were represented separately.

Quite aside from the county's being a party, however, there is no prohibition in the statute of the prosecuting attorney's representation of county officers, employees and board members who are sued in actions touching and concerning the county's business. The representation of the county might very well require the representation of the individuals.

The case of *State ex rel Lashly v. Wurdemann*, 183 Mo.App.28, 166 S.W.348 (1914) appears to be in point. There an action of mandamus was filed against the judges of the county court of a particular county, to compel them to issue a license for a dram-ship. The prosecuting attorney sought to appear on behalf of the defendants, even though they apparently did not want him to do so. The court held that the suit challenged a county function and that the prosecuting attorney was entitled to represent the county's interest in the suit even though it took the form of a suit against the county judges individually.

The suit you describe challenges the county's authority in the zoning area. No conflict of interest among the defendants appears. Under these circumstances we consider it to be the duty of the prosecuting attorney to protect the county's interest in maintaining its zoning authority, and this requires the representation of the individual defendants.

The situation is comparable to that faced by the Attorney General under Chapter 27 of the Revised Statutes, which is silent about the authority of the Attorney General to appear on behalf of individual state officers and employees who are made parties to litigation arising out of the performance of their official duties. This office has felt that it had the authority to represent individuals when such was necessary in the representation of the state's interest. Compare *Kirkpatrick v. Preisler*, 385 U.S. 450, 87 S.Ct. 613, 17 L.Ed.2d 511 (1967).

There might be cases in which the individual defendants **had** interests which were adverse to those of the county, or even, in which the prosecuting attorney might find it necessary to file suits on behalf of the county against county officers or employees. In these cases, the individual defendants would of course have to obtain individual counsel. When the suit tests the county's authority, however, the representation of the individuals seems clearly necessary.

Honorable John Crow

CONCLUSION

The prosecuting attorney of a second class county has the authority and the duty to represent county officers, employees and board members who are made defendants in a suit testing the authority of the county in the exercise of a county function.

The foregoing opinion, which I hereby approve, was prepared by my special assistant, Charles B. Blackmar.

Very truly yours,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned above the typed name and title.

JOHN C. DANFORTH  
Attorney General