

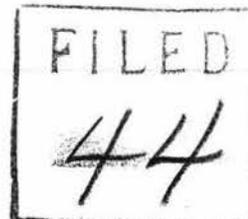
PROSECUTING ATTORNEYS:
ELECTIONS:

Candidate for office of prosecuting attorney not required to be licensed attorney to be eligible for nomination. County Clerk must receive said candidate's declaration and place his name on the ballot.

February 15, 1950.

FILED 44

Honorable Claude R. English
Representative from Moniteau County
California, Missouri



Dear Mr. English:

We have your recent request for an opinion from this office. Your letter of request is as follows:

"In our county we have a young man who desires to become a candidate for Prosecuting Attorney who is not now a member of the Bar. He has been a resident of the county for more than one year and is a qualified voter. He expects to graduate from the Law Department of the University of Missouri in June of this year, and he expects to take the bar examination and be admitted to the Bar during this year, but probably after the August primary.

"Will you kindly give me an opinion as to whether the proposed candidate can properly file his declaration and the county clerk should receive the same and place his name on the ballot."

Section 12934, R.S. Missouri, 1939, describing election and qualifications of prosecuting attorneys is as follows:

"At the general election to be held in this state in the year A.D. 1880, and every two years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified."

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You will note that the statute above set out does not provide, in express terms, when the candidate must possess the qualifications contained in said section. It merely provides that "there shall be elected * * * a prosecuting attorney, who shall be a person * * * duly licensed to practice law in this state, * * *." There is no language other than the provision for residence to indicate whether the candidate must possess said qualifications at the time of nomination, election, commencement of the term, or induction into office. The statute merely recites that on the date of the general election a prosecuting attorney shall be elected. Then it goes on to detail the qualifications which the prosecutor must possess, without specifying on what, or by what date said qualifications must be possessed. That this omission is not unusual is emphasized by the following quotations:

42 Am. Jur. Sec. 39, page 910:

"The courts are frequently called upon to determine the question as to when the conditions of eligibility to office must exist, whether at the time of election, the commencement of the term, or the induction into office. In ascertaining this matter, the language used in the constitutional or statutory provision declaring the qualifications is to be considered. It may expressly or by necessary implication specify the time when the required eligibility must exist. Where such is the case, there can be no question but that the candidate must possess the necessary qualifications at that time. * * *"

42 Am. Jur. Sec. 40, page 911:

"If the Constitution or statutes do not specify the time when the conditions of eligibility must exist, it is necessary for the courts to have recourse to some other means of determining the matter. The terms employed in declaring the qualifications are to be taken into consideration. And since these are necessarily variant, it is not strange that the courts have reached different conclusions. * * *"

27 C.J.S. page 375:

"The authorities disagree as to whether eligibility for the office of prosecuting attorney should be determined as of the time of election or as of the time of induction. * * *"

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"Time to which eligibility relates. The question whether eligibility to hold office of district or prosecuting attorney has reference to the time of election to the office or to that of induction into office is the subject of conflicting decisions, some statutes being construed to have reference to the time of election or appointment, while others have been construed to refer to the time of induction into office. * * *"

The courts have placed various interpretations on such an omission. The following cases deal with the question of the time by which the qualifications must be possessed.

Enge v. Cass, 148 N.W. 607, l.c. 608:

"* * * we shall assume that by necessary implication, both from the Constitution and statutes, no person is competent to qualify and enter upon the discharge of his duties as state's attorney unless he is first duly licensed to practice as an attorney and counselor at law in the courts of this state.

"It does not follow, however, that he must have possessed such qualification at the date of his election. In other words, if at such time he was an elector of the county, he possessed sufficient qualification to render him eligible as a candidate at the election."

State ex rel. Flynn v. Ellis, 98 P. 2d 879, l.c. 882:

"That the legal qualifications for holding public office are not in every instance required to be present at the time of election, is seen by reading provisions in the state and federal Constitutions relating to senators, representatives, judges, etc.; e.g. section 3, Article I, United States Constitution, U.S.C.A.: 'No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not when elected, be an Inhabitant of that State for which he shall be chosen.'

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"In 22 R.C.L., section 43, page 403, we find this language: 'The courts do not agree as to the time at which the eligibility or qualification of a person for public office must be determined. The question has arisen most frequently under statutory or constitutional provisions using the words "eligible" in connection with certain qualifications or disqualifications for public office. One line of authorities holds that the time of election is the proper time to test whether a person is qualified or eligible, and that it is immaterial that a person then disqualified removes the disqualification before actually entering on the duties of the office. * * *'"

We have been unable to find any case in which the instant question was directly before the Courts of this State. The Supreme Court of Missouri, in State v. Sanderson, 280 Mo. 258, briefly touched on the question but was not called upon to decide it.

An exhaustive review of the authorities from other states reveals, as stated heretofore, a definite division of opinion as to whether the statutes have reference to eligibility at the date of election, or at the time of taking office. We have, however, found not one case which even suggests that the statutory requirements for eligibility to office, such as the one with which we are here dealing, must be met before the election.

Since no authorities state that a candidate must, in the absence of a specific and express statute to the contrary, possess such qualifications before the date of his election, we are led to the conclusion that a candidate for the office of prosecuting attorney need not be a licensed member of the Bar before the date of his election.

CONCLUSION

It is the opinion of this office that a candidate for the office of prosecuting attorney need not be a duly licensed

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attorney in order to file his declaration of candidacy, nor to be eligible for nomination. The County Clerk must receive said declaration and place the candidate's name on the ballot.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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