

• **District Court—Judges—Clerk of District Court—Absence.**

The clerk of the district court is authorized to sign orders in probate matters when for any reason the district judge is absent from his chambers.

W. E. MacDonald, Esq.,  
County Attorney,  
Fort Benton, Montana.

February 5, 1925.

My dear Mr. MacDonald:

You have asked this office for an interpretation of section 10376, R. C. M., 1921, in regard to what constitutes absence of the district judge.

A similar question was presented to the supreme court of Colorado in the case of Glavino v. People, 224 Pac. 225. In that case the court was given authority to appoint a special prosecutor when the district attorney was "absent." In discussing the question as to when the district attorney was "absent" within the meaning of the statute, the court said:

"It is claimed there was no statutory cause for the appointment; that the record shows only the absence of the deputy district attorney and nothing as to the district attorney himself; and that the affidavits on the motion to dismiss show that the deputy district attorney was in the district. We think 'absent' means 'absent from court.' The purpose is to see to it that justice shall proceed. The district attorney is supposed to be always present

when court is in session as the formal records show. If he is not, and action is required, the court appoints some fit person that justice may be done."

In *Dean v. Dean* (Tex.) 214 S. W. 505, the statute under consideration authorized the election of a special judge by the bar when the judge shall be "absent." The facts in that case as stated by the court were:

"The regular judge had been asked to go to Houston to aid in war work, and had agreed to do so, expecting to be absent for some time, but did not contemplate resigning. On June 20, 1918, he requested the clerk of the court to notify the bar that he would not hold court the remainder of that week, and to ask them to elect a special judge. They did so, and the special judge called this case for trial. Plaintiff announced ready, and defendant's counsel stated that they expected to be ready for trial the next morning, and asked that the case be passed to that time. This was done. The next morning the defendant announced ready, and the trial proceeded.

"Some time during the day of the 20th, after the election of the special judge, the regular judge passed through the courtroom, going to his private chamber. This was after the special judge had adjourned court for the day."

In holding that the judge was absent within the meaning of the statute, the court said:

"We hold: (a) That the regular judge was absent within the meaning of the statute when the special judge was elected; (b) that passing through the courtroom, without any intention of discharging his official duty, did not terminate his absence."

It should be noted that our statute as originally adopted by the legislature provided that the clerk of court should have the authority to sign petitions, etc., as mentioned in said section, only during vacation period and this was afterward amended to read "absence of the judge." The statute does not say absent from the county.

It is, therefore, my opinion that any time the district judge is absent from his chambers for any reason whatsoever the clerk has the authority to sign the papers referred to in section 10376, R. C. M., 1921.

Very truly yours,  
L. A. FOOT,  
Attorney General.