



STATE OF KANSAS

*Office of the Attorney General*

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER  
Attorney General

September 13, 1974

Opinion No. 74- 317

Farris and Mears  
Attorneys at Law  
P. O. Box 2  
Atchison, Kansas 66002

Gentlemen:

You inquire concerning the application of K.S.A. 19-705 to the following circumstances. As a result of a boating accident on August 3, 1974, on the Missouri River in the Atchison vicinity, a collision between a bass boat and a canoe occurring after dark, two women were injured, one fatally. The bass boat, owned by a captain on the Atchison police force, was occupied by three Atchison men. Occupants of the canoe were also local citizens, and, together with the police captain, have been personal associates as well as former clients of yourself and Mr. Farris.

The day after the accident, the husband of the decedent requested you to assist him in legal matters arising out of the accident. On August 5, 1974, two days after the accident, the police department requested that you make an official investigation of the accident, to determine whether any criminal charges would be warranted. Because of your close relationship with the police department, including the captain, and with the occupants of the canoe, you declined. After contacting this office, arrangements have been made for an investigator of the Forestry, Fish and Game Commission to conduct an investigation of the accident.

It is your view that as a result of your close association with the parties involved in the accident, that you both face a conflict of interest insofar as concerns investigation and prosecution of possible criminal charges, based upon paragraph 1.2(b)(iii) of the American Bar Association Standards of Criminal Justice, and that accordingly you should not prosecute any criminal charges which may be called for after the investigation by the Forestry, Fish and Game Commission is completed. Should such charges be found necessary, you would appropriately ask the county commissioners to engage a special prosecutor.

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Your especial concern involves K.S.A. 19-705, which states in pertinent part thus:

"No county attorney shall.... be concerned as attorney or counsel for either party, other than the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced but undetermined, shall depend...."

You inquire specifically whether your positions as county attorney and assistant county attorney prohibit your representation of any of the parties in any civil matter arising out of the accident, in view of this statute.

In an opinion dated March 27, 1968, Attorney General Robert Londerholm stated thus:

"The apparent intent of 19-705 .... is that an attorney should not be engaged as counsel in a civil action involving facts which he has investigated in an official capacity for the purpose of determining criminal responsibility. It is the identity of the facts in both the civil and criminal matters which controls and not whether the criminal defendant is himself the actual party involved in the action .... As you know, when concerned with matters of legal ethics, the rule is to avoid the appearance of any questionable conflict."

K.S.A. 19-705 prohibits a county or district attorney from being concerned as attorney or counsel in any civil action which depends upon the same facts which underlie a criminal prosecution in which he is involved in his prosecutorial capacity. In the circumstances described above, you have clearly had no involvement or concern in any official capacity whatever with the facts upon which either a subsequent criminal and/or civil proceeding may be based. The statutory disqualification does not operate merely *ex officio*, without more. By virtue of your offices as county attorney and assistant county attorney, the statute does not disqualify you from concern or participation as attorneys or counsel for parties to a civil proceeding, merely because the facts upon which that proceeding depends may also be the basis for a criminal prosecution with which you have no involvement

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concern or participation by virtue of your office. Having determined, as you have, that your prior association with the parties involved in the accident prevents your acting in a prosecutorial capacity in any criminal proceeding which may derive therefrom, and having abstained entirely from any participation in any official investigation of the matter for the determination of possible criminal charges, you are not by virtue merely of your office disqualified from participation in subsequent civil proceeding as attorney or counsel for individuals involved in the accident.

Very truly yours,



VERN MILLER  
Attorney General

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