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STATE OF KANSAS

*Office of the Attorney General*

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

VERN MILLER  
Attorney General

December 6, 1974

Opinion No. 74-385

Mr. David S. Knudson  
Saline County Attorney  
City-County Building  
300 West Ash  
Salina, Kansas 67401

Re: K.S.A. 1973 Supp. 59-2917

Dear Mr. Knudson:

This will acknowledge receipt of your letter requesting an opinion as to the duty of the county attorney to represent applicants in proceedings to determine mental illness or alcoholism.

You have asked whether or not these statutes imposing the duty are unconstitutional because you state numerous conflicts of interest are raised by the county attorney's representation of applicants who may also be charged with a crime.

The acts for obtaining care and treatment for mentally ill persons and alcoholics and intoxicated persons, K.S.A. 1973 Supp. 59-2901, et seq., and K.S.A. 65-4001, et seq., respectively, determine the responsibilities of the county attorney in such actions. K.S.A. 1973 Supp. 59-2917 and K.S.A. 65-4036 impose identical duties in this regard:

"If the applicant is not represented by counsel, the county attorney shall represent the applicant, prepare all necessary papers, appear at the hearing and present such evidence as he shall determine to be of aid to the court . . . ."

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It is manifest from this language that the county attorney must represent the applicant. The reason for the imposition of this duty seems to rest on the underlying public interest in these proceedings. The statutory definitions of the determinations that are to be made at these hearings clearly illustrates the public interest, that is whether the proposed patient is a mentally ill person, alcoholic or intoxicated person.

K.S.A. 1973 Supp. 59-2901(1) provides in part:

"The term 'mentally ill person' shall mean any person who is mentally impaired, except by reason of mental deficiency only, to the extent that he is in need of 'care or treatment' and who is or probably will become dangerous to himself or the person or property of others if not given 'care and treatment' and

"(A) who lacks sufficient understanding or capacity to make responsible decisions with respect to his need for 'care and treatment,' . . . ." [Emphasis supplied.]

K.S.A. 65-4003(1) provides:

"'Alcoholic' shall mean a person who habitually lacks self-control as to the use of alcoholic beverages, or uses alcoholic beverages to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted."

K.S.A. 65-4003(11) provides:

"'intoxicated person' shall mean a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol."

We do not feel that these statutes imposing the duty upon county attorneys to represent applicants are unconstitutional notwithstanding the fact that conceivably situations may arise where there is a conflict of interest. In those instances where this problem presents itself there are alternatives available, such as a motion to withdraw or the appointment of a special prosecutor, which effectively avoid the conflict.

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You have additionally asked whether a county attorney must represent all applicants. The statutes regulating the filing of applications set forth sufficient safeguards against those applicants whose claims are unfounded. These safeguards are embodied in K.S.A. 65-4028(C):

"(3) The applicant's belief that such person is intoxicated or incapacitated by alcohol and because of his illness is likely to injure himself or others if not immediately detained;

\* \* \*

"(5) . . . The application shall be accompanied by a statement in writing of a physician stating that he has examined such person within forty-eight (48) hours before the date of the statement and confirming the existence of the described condition of such person."

and also in K.S.A. 1973 Supp. 59-2913:

"Any such application may be accompanied or the probate court may require that such application be accompanied, by a statement in writing of a 'physician' stating that he has examined the 'proposed patient' and the results of the examination on the issue of whether the 'proposed patient' is a 'mentally ill person' or the probate court may allow such application to be accompanied by a verified statement by the applicant that the 'proposed patient' has refused to submit to an examination by a 'physician.'"

The presence of these safeguards coupled with the underlying state interest clearly imposes a duty on county attorneys to represent all applicants who have complied with the statutory requirements in filing their applications.

Additionally, we are enclosing a prior opinion of this office, dated March 19, 1973, to Mr. J. David Farris, Atchison County Attorney, the last paragraph of which is addressed to the question in point which further substantiates our position.

Very truly yours,



VERN MILLER  
Attorney General

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Enclosure



STATE OF KANSAS

*Office of the Attorney General*

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

VERN MILLER  
Attorney General

March 19, 1973

J. David Farris  
Atchison County Attorney  
County Courthouse  
Atchison, Kansas 66002

Dear Mr. Farris:

In your letter of February 16, 1973, you ask whether you as County Attorney of Atchison County are required to file in the probate court of the county a verified petition to determine whether the individual that you mention is a mentally ill person.

The "Act For Obtaining 'Care and Treatment' For a 'Mentally Ill Person'", K.S.A. 1972 Supp. 59-2901 et seq., determines the responsibilities of the county attorney in such actions.

K.S.A. 1972 Supp. 59-2917 provides in pertinent part thus:

"If the applicant is not represented by counsel, the county attorney shall represent the applicant, prepare all necessary papers, appear at the hearing and present such evidence as he shall determine to be of aid to the court in determining whether the 'proposed patient' is a 'mentally ill person.'"

K.S.A. 1972 Supp. 59-2940 also prescribes certain duties of the county attorney; however, they do not appear to be relevant to the question you pose.

The term "applicant", mentioned in K.S.A. 1972 Supp. 59-2917, refers to those persons designated in K.S.A. 59-2913 who may file a verified application to determine whether a proposed patient is mentally ill.

K.S.A. 1972 Supp. 59-2913 provides in relevant part as follows:

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"Any reputable person may file in the probate court of the county of the 'proposed patient's' residence or presence a verified application to determine whether the 'proposed patient' is a 'mentally ill person.'" [Emphasis supplied.]

We find nothing in these statutes which requires the county attorney to initiate such proceedings. However, if the reputable person mentioned in K.S.A. Supp. 59-2913 is not represented by counsel, the county attorney must represent him, pursuant to K.S.A. 1972 Supp. 59-2917, quoted in part above, and shall prepare all necessary papers as well as present the case to the probate court.

Very truly yours,

VERN MILLER  
Attorney General

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