



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

March 31, 1981

ATTORNEY GENERAL OPINION NO. 81-81

William H. Pringle  
Barton County Attorney  
P.O. Box 881  
Great Bend, Kansas 67530

Re: County and County Officers -- County Attorney --  
Employment of Additional Attorney to Assist County  
Attorney

Synopsis: K.S.A. 19-723, which authorizes the board of county  
commissioners to employ an additional attorney to  
assist the county attorney, involves a discretionary  
power held by the board and does not mandate such  
special assistant be employed. Cited herein:  
K.S.A. 19-723, G.S. 1949, 19-718.

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Dear Mr. Pringle:

You request our opinion regarding a question which you phrase:

"A question has arisen whether, if the County Attorney  
feels he has a definite conflict of interest, the Board  
of County Commissioners is obligated to obtain a  
special prosecutor for the purpose of prosecuting  
the violation . . . .

William H. Pringle  
Page Two  
March 31, 1981

"The authorization for the hiring of an attorney is contained in K.S.A. 19-723. The question on which an opinion is requested is whether the Board of County Commissioners is obligated to provide counsel where the County Attorney claims a conflict of interest."

K.S.A. 19-723 is clear and unambiguous. It provides that "when, in the judgment of the board . . . it becomes necessary or expedient, the said board of county commissioners may" employ a special prosecutor. (Emphasis supplied.) From this language it appears clear that the board may appoint a special prosecutor, but is not obligated to do so. Several cases involving this statute would seem to support this conclusion, but they do not directly deal with the question. Womer v. Aldridge, 155 Kan. 446 (1942); State v. Ellis, 192 Kan. 315 (1963).

In Womer, the Kansas Supreme Court cites State, ex rel., v. Younkin, 108 Kan. 634 (1921), in discussing a similar issue (the authority of the board to hire independent abstractors in tax foreclosure suits):

"When the legislature confers power in general terms upon an official body, without prescribing details for the exercise of that power, the courts will not be officious to interfere with the official body's discretionary methods of performing the public duty intended by the legislature in granting such powers." (citations omitted) 155 Kan. at 449.

In Ellis, supra at 317, 318, we note the Supreme Court, in discussing G.S. 1949, 19-718 (now repealed), states:

"From a reading of the mentioned statutes [G.S. 1949, 19-717, 19-718, 19-723] it is apparent the legislature, in the public interest . . . determined not to leave the matter of assistance to the county attorney entirely to the will of the county commissioners or the prosecuting witness and has made provisions leaving the appointment of counsel in certain cases to the discretion and judgment of the trial judge." (Citations omitted.)

The above quotation lends additional credence to the proposition that K.S.A. 19-723 authorizes rather than demands that the board of county commissioners appoint a special prosecutor. Thus, it seems clear that the board may or may not choose to appoint a special prosecutor.

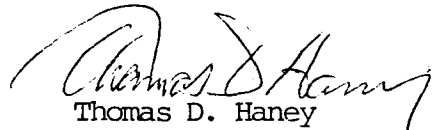
William H. Pringle  
Page Three  
March 31, 1981

Although we are of the opinion the board is not legally required to hire a special prosecutor, we certainly would encourage the same in the interest of justice, when a bona fide reason exists which precludes the county attorney or his or her office from prosecuting a given matter.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Thomas D. Haney  
Deputy Attorney General

RTS:TDH:may