

Utah Ethics Opinions

1972.

10. USB EAOE Opinion No. 10

Ethics Advisory Opinion No. 10

Approved July 7, 1972

[Modified or overruled by Opinion No. 126]

Summary: Municipal attorneys in sparsely populated areas of Utah may represent criminal defendants in other municipalities.

Comments: This opinion is a modification of Utah Opinion 6.

Facts: The Board has reviewed its Ethics Opinion dated January 13, 1972 relating to the propriety of prosecutors for municipalities and city attorneys engaging in criminal defense work in jurisdictions other than those in which they serve as prosecutor. Our attention has been called to several ameliorating facts. In many of the sparsely populated areas of the state where the attorney population is small or almost nonexistent, the few attorneys in those areas represent municipalities, to provide the town with legal representation rather than because of the fees or salary involved, which is always minimal, based upon the ability of the town to pay.

Opinion: If the attorney in each instance is required to make a choice between representing the town and handling criminal defenses in other municipalities, from an economic standpoint, he must forego representation of the town in its few criminal prosecution matters.

Such a result would find most of the cities and towns in Utah unable to obtain the services of a local prosecutor, except by importing him from the one large population center, where few, proportionately, of the attorneys or their partners are engaged in prosecutions. Even this might be difficult since the defense of a single criminal case would likely, from a monetary standpoint, exceed the amount a small town could pay for all of its prosecutorial functions.

The problem is not moderated in our small cities either by the fact that those few cities are surrounded by towns in which there are no lawyers, and they must, of necessity, rely upon an attorney from the city to handle these few prosecutions. More frequently than not, substantially every firm of attorneys in the city is representing one of the small municipalities, and the interdiction of our former opinion finds all of these attorneys precluded from practicing criminal law in the city where substantial criminal work is

available or foregoing representation of the small municipalities.

A particular example of this is the Weber-Davis County area, where there are numerous small municipalities, but only one real center of lawyer population, Ogden. There are fewer than 100 attorneys in Ogden, the second largest lawyer population in Utah. After deducting judges, county and district attorney staff, and full time house counsel, and others precluded, a survey reveals that there are few lawyers in Ogden in partnerships where a member of the firm is not engaged in prosecutorial functions for one of the small surrounding towns, and few sole practitioners who do not represent one of the small municipalities.

Obviously, under our prior opinion, these lawyers must forego representation of the small municipalities to the detriment of such municipalities, or they must forego the practice of criminal law entirely, a choice which leaves the small municipalities unrepresented.

ABA Formal Opinion 55 recognizes an exception to the rule that city prosecutors may not defend criminals in other jurisdictions where, because of the small number of attorneys, the court feels impelled to assign prosecutors to defense functions in courts other than the one in which he acts as prosecutor. In effect, Formal Opinion 55 balances the greater need with the ethical considerations and holds that the ethical consideration must give way to the greater need.

We are disposed to engraft a similar exception where to rule otherwise would be tantamount to depriving all of the small cities and towns of this state of representation by an attorney to handle their few criminal prosecutions.

Accordingly, we hold that in this state the lawyer population is so small in all areas, save and excepting Salt Lake County, that the ethical considerations must give way to the practical needs of the communities.

In so holding, we caution attorneys that this is an area where the appearance of impropriety could easily arise to the embarrassment of the individual attorney and the Bar itself and we counsel circumspection on the part of attorneys.