

## Utah Ethics Opinions

1972.

### 7. USB EAOB Opinion No. 7

Ethics Advisory Opinion No. 7

Approved March 31, 1972

**Summary:** It is improper for a deputy attorney whose position involves work in tax matters to represent private clients in federal tax matters.

**Facts:** You have inquired whether or not there exists a conflict of interest in the following fact situation:

You have recently become a deputy attorney to advise the county assessor on tax matters, and some work for the county with reference to federal excise taxes charged on goods sold or services-rendered to the county.

You have heretofore represented a client in a federal income tax matter which involves income tax liability in failing to file tax returns for several years. The matter is still in the audit stage, but you have had conferences with the special agent in charge of the criminal aspects of the case, which could ultimately be presented to a federal grand jury for indictment or information; and could result in a federal criminal charge.

**Opinion:** Formal Opinion 262 of the American Bar Association Committee on Professional Ethics considers this problem at some length where it involved a state prosecuting attorney, who is entitled by law, to carry on a private practice and whether he may represent persons before federal boards or bureaus or criminal defendants before federal courts.

The opinion contains the following language:

"A state prosecuting attorney does not represent the United States. His public duties, by and large, are related to activities which do not constitute a violation of federal laws, and in the submitted question representation in the federal courts or before federal boards and bureaus of defendants or respondents whose activities might also violate state laws is excluded. Nevertheless, we feel that the reasoning of the opinions of this Committee, particularly Opinion 30, is applicable in the field of criminal prosecutions as that is usually understood. Cases are not infrequent where lack of available proof or a technicality may prevent conviction of a criminal in a state court, but he has been convicted of a federal crime uncovered in the investigation of an alleged violation of state laws, such as

violation of the penal sections of the Income Tax Law. Because of this, we believe that cooperation between federal and state prosecuting attorneys in the ordinary field of criminal law would be interfered with if we sanction the representation by state's attorneys of defendants indicted in the federal courts.

Recent years, however, have seen a very large expansion of the field of professional practice before federal boards and bureaus. We do not think that such activities, even where an administrative body, such as C.P.A. can seek the imposition of fines and penalties, are associated in the public mind with crimes such as are generally dealt with by state or federal prosecuting attorneys.

In such cases, we do not believe that the activities described in the question put to the Committee would lessen the confidence of the public in the integrity and impartiality of the administration of justice, be a reflection on members of the legal profession, or interfere with cooperation between state and federal prosecuting attorneys. Accordingly, we hold that, when permitted by law, representation by a state prosecuting attorney of a respondent in proceedings instituted by or pending before federal boards or bureaus is ethical, where the matter involves no violation of state laws. In so holding, however, it is to be understood that whenever in a particular case any doubt exists as to the applicability of the Canons or of the reasoning contained in the opinions of this Committee to which we have referred, the state prosecuting attorney should refuse to represent a party to the federal proceeding.

In the present instance, since the ultimate disposition of the federal tax matter may be that of a federal criminal charge against your client, it would appear that this matter would not generally come within the exception noted in Formal Opinion 262.

The reasons stated in Formal Opinion 252 against representation of a client in the federal court appears to have equal validity in your matter.

ABA Formal Opinion 30 cited in Formal Opinion 266 contains the following analysis of the question of a prosecutor in one state representing a criminal defendant in another state.

"It is a well-known fact that prosecutors are granted courtesies and assistance by the police departments, as well as the prosecuting authorities, of other cities and counties throughout the country. This practice is of great benefit to the administration of criminal justice. If prosecutors indulged in the practice of defending criminals in states

other than their own, this helpful cooperation might easily and quickly be withdrawn. Other evils, detrimental to the proper enforcement of criminal laws, are not difficult to conceive, were prosecutors also acting as defenders of those accused of crime. Subjectively, the effect of such a practice upon the prosecutor himself must, in our opinion, be harmful to the interest of the public, whose service is the prosecutor's first and foremost duty."

Canon 9, of the Code of Professional Responsibility is the controlling principle in a matter of this type. Canon 9 reads:

"A lawyer should avoid even the appearance of professional impropriety."

Ethical considerations 9-1 and 9-2 thereunder read as follows:

"9-1 Continuation of the American concept that are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients- or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

It is true in the fact situation you postulate, you will have no criminal duties. However, traditionally in this state, and more particularly in the future, the office of the county attorney exists in the minds of laymen primarily as an office handling criminal matters.

It would therefore appear, that every reason stated in ABA Opinion 262 is applicable in this instance and interdiction of Canon 9 applies, therefore it would be improper.