

## Utah Ethics Opinions

1975.

### 22. USB EAOB Opinion No. 22

Utah State Bar Ethics Advisory Opinion No. 22

Approved June 18, 1975

**Summary:** It is improper for a county attorney or his associates to represent criminal defendants.

**Comments:** See Utah Opinions 6 and 10

**Facts:** Your inquiry is founded upon the following statement of the problem as set forth in your letter:

"\* \* \* in rural areas, attorneys face ethical challenges when they are on retainer from small cities and towns and are also appointed to represent criminal defendants before the District Courts. In some cases county attorneys have been asked to represent criminal defendants in other counties than the one in which they would be responsible as a prosecutor."

You have asked that the Ethics Committee consider the difficult challenges facing rural attorneys in these problem areas and to provide guidance.

Opinion: The first problem you have posed involving criminal defense work by municipal prosecutors was treated by the Ethics Committee in an opinion dated January 13, 1972.

In that opinion this body held that a municipal prosecutor might properly accept assignments by the court to defend indigents charged with crimes in courts other than the one in which he is the prosecutor.

On July 7, 1972 the Ethics Committee modified that opinion holding that municipal prosecutors could thereafter properly accept the defense of criminal matters in courts other than the one in which he is the prosecutor in the sparsely populated areas of the state and in those areas of the state where the meager lawyer population made it impossible for small cities and towns to employ an attorney if the attorney's criminal practice would thus be terminated under our former ruling. It was determined by the Ethics Committee that this modification would apply in all counties of the state except Salt Lake County.

The exception engrafted by this opinion was to make it possible for small cities and towns to engage counsel. The Ethics Committee took cognizance of the ethical problem

but concluded the ethical considerations in such circumstance must give way to the greater public need. These opinions would appear to resolve the first problem you have stated.

The second problem of county attorneys representing indigent criminal defendants by assignment or accepting the defense of criminal defendants on an employment basis, has been answered by an ethics opinion issued by the Ethics Committee February 1, 1965, and October 12, 1973.

In the former opinion this body said:

"The Board of Commissioners has several times held that it is improper under Canons 6 and 29 for a county attorney to handle the defense of criminal matters in the same or other counties." Citing ABA Formal Opinions 30, 118, 186, 292A, and 293A.

The same reasons which impel the Commission to take this view in compensated matters are present with equal force in matters where counsel is assigned."

In the opinion of October 12, 1973, the Ethics Committee held that it was improper for a county attorney to represent a criminal defendant in another state.

The thread running through these cases is exemplified in the following language from ABA Formal Opinion 30:

"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."

and the language of Canon 9 of the Code of Professional Responsibility which is as follows:

"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."

The Ethics Committee has deemed it proper to strain ethical propriety for expediency purposes, based upon hardship factors relating to attorneys. Where the collision course has been that of public need versus the ethical considerations, the Committee has recognized the greater public need, if it exists, as it did in the situation of the smaller cities and towns, and without intending to minimize the ethical factors, has held that the greater public need justifies what is otherwise an ethical violation.

The Ethics Committee, having reviewed the matters raised by your second situation, is of the opinion that the problems raised in the quoted portion of Formal Opinion 30, above, and those contained in Canon 9 of the Code of Professional Responsibility, apply with far greater force when the office involved is that of county attorney, the prosecutor for the county, since he, by reason of his position, has by far the greater opportunity for access to courtesies and assistance of police departments, and far greater opportunity exists for the appearance of impropriety. Accordingly, we hold that it is improper for a county attorney or anyone with whom he is associated in the practice of law, to represent criminal defendants, during the time he is in office.

In your letter, you advise that at least one district judge is currently, on a case by case basis, ordering county attorneys to represent criminal defendants in counties other than their own, and that such an order is made in both uncompensated and compensated cases.

Obviously, the attorney ordered to defend a matter by the court is under a duty to comply with the court order. This may excuse the ethical breach. It does not eliminate the ethical breach.

The judge is in a position to evaluate each individual case within his district and if the need for counsel outweighs the ethical breach, in his mind, certainly it is his prerogative to make a decision to assign counsel to represent an indigent criminal defendant even though that counsel may be a county attorney in another county in the district.

It would appear to be questionable, however, whether such an order should be made in the case where the defendant

has funds with which to employ counsel. In such cases, the fact that the criminal defendant may be required to look further afield for representation, in the opinion of this body, should not be a reason for the entry of an order by the court requiring a county attorney to commit an ethical breach.

Rule Cited:

Utah Opinions 6 & 10