

Utah Ethics Opinions

1979.

59. USB EAOB Opinion No. 59

Utah State Bar

Ethics Advisory Opinion No. 59

Approved April 12, 1979

Summary: A county attorney may not represent the same plaintiff against the same defendant in both a civil and a criminal matter.

Comments: See Utah Opinion 15.

Facts: Inquiry has been presented to the Ethics Committee as to whether or not a part-time county attorney, who also has a private practice, can participate in two actions involving the same defendant. The first is a criminal action wherein it is assumed that the attorney is acting in a prosecutorial role. In the second matter, it is assumed that the attorney wishes to represent the plaintiff in a civil action against the defendant.

Opinion: A similar sort of problem was raised in Utah Opinion 15. That opinion discussed ABA Formal Opinion 39, wherein a prosecutor had determined that there was not sufficient cause to prosecute "A" for fire insurance fraud. Thereafter, "A" sought to engage the same attorney in a civil suit against the insurance company to collect the insurance proceeds. The ABA Committee held that this was improper and stated as follows:

"If the lawyer, after his retirement from public office, should not accept employment in connection with any matter which he has investigated or passed upon while in public office, it seems clear that he should not accept such employment while he is still in public office."

Also discussed was Formal Opinion 135 of the American Bar Association. This opinion held that a lawyer could not participate in any manner in a civil action which involved the same matter in which the prosecutor had been involved while in public office, both during and subsequent to such employment. The Utah Ethics Committee concluded that "A county attorney cannot properly undertake civil cases where he has investigated the criminal aspects thereof, nor may he undertake civil cases arising out of facts which have led to a criminal action which is at rest, in which he prosecuted." The interdiction of Canon 9, DR 9-101(B) embodies this prohibition:

"A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

The prohibition applies both while in public office and after employment, and is in force regardless of whether the attorney seeks to represent the person accused in the criminal prosecution or another party in a subsequent civil action.

Rule Cited:

Utah Opinion 15