

Utah Ethics Opinions

1980.

73. USB EAOB Opinion No. 73

Utah State Bar

Ethics Advisory Opinion No. 73

Approved February 11, 1980

[Modified or overruled by Opinion No. 126]

Summary: A municipal prosecutor may not represent criminal defendants in the same circuit court district, even if the defense is conducted in different divisions of that court.

Comment: See also, Utah Opinions 6, 10 and 22.

Facts: The Ethics Committee of the Utah State Bar has been presented with a question of ethical propriety of an attorney employed by a municipal prosecutor, also representing criminal defendants within the same circuit court district. The problem arises in the Eighth Circuit Court, and the attorney involved represents a small city outside of Provo or Orem, the main population centers. Therefore, the attorney appears as prosecutor before the same circuit court judge and sometimes juries, as those he appears before as defense counsel, although in different divisions of the circuit court, and in prosecutions brought by a governmental entity other than the one by whom he is employed as prosecutor.

Opinion: This question was first addressed by the Utah State Bar, in Utah Opinion 6, wherein it was held that a municipal prosecuting attorney could not act as criminal defense counsel in other jurisdictions, except when assigned to do so by the court. This opinion was reconsidered in Utah Opinion 10, where the particular problems arising in the rural areas of the state were addressed. The Ethics Committee noted that in some parts of the state the lawyer population was very small, making it difficult if not impossible to obtain municipal counsel who would not also be involved in criminal work. The Committee noted that "if the attorney in each instance is required to make a choice between representing a 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." The Committee then held that practical necessities required an exception to the ethical prohibitions in areas other than Salt Lake County, so as to permit municipal attorneys to also engage in criminal defense work outside of their own jurisdictions. The

opinion noted that the practice was, however, to be avoided if at all possible.

It has further been held, in Utah Opinion 22, that a county attorney may not represent criminal defendants under any circumstances. The opinion notes that such practice is prohibited because of a prosecutor's access to courtesies and assistance of police departments and the greater opportunity for the appearance of impropriety in such a dual role.

The situation presented does not fall squarely within the exception noted in Utah Opinion 10. The advent of the circuit court system, replacing the former city court system, has a direct impact on the question posed herein. Under the former court system, a municipal attorney who was also engaged in criminal defense work, would be appearing before different judges and juries in the two types of representation. However, under the circuit court jurisdiction, that difference in judges and juries no longer exists. It appears to the Committee that the ethical considerations have more direct bearing on the statewide circuit court system than under the prior system. Therefore, the rationale for the rural exception is now vitiated and would appear to the Committee to be inapplicable in the situation described. The likelihood of the appearance of impropriety existing where a lawyer appears before the same judge and jury as both prosecutor and defense attorney is much more likely than where the conflicting appearances are before different judges and juries with clear demarcations of jurisdiction.

The Committee therefore holds, that a prosecution attorney may not also act as defense counsel in matters within the same circuit court district as that in which he is acting as prosecutor.

Rule Cited:

Utah Opinion 6, 10 & 22