**Utah Ethics Opinions**

**1973.**

**15.** USB EAOC Opinion No. 15

Ethics Advisory Opinion No. 15

Approved October 12, 1973

**Summary**: A county attorney may not accept employment in a civil matter where he had previously determined as county attorney that there was not sufficient cause to bring criminal charges in the same matter.

A county attorney may not accept employment in a civil matter involving parties and subject matter of a completed action where he acted as criminal prosecutor.

**Facts**: You have posed two questions concerning ethics as follows:

1. If a citizen consults with the county attorney regarding the initiation of criminal action, and the county attorney determines that there is not sufficient cause to bring criminal charges, may the county attorney accept employment to handle the civil matter?

2. May a county attorney ethically accept employment in a civil action which involves parties and subject matter of a completed criminal action in which the county attorney acted as prosecutor?

**Opinion**: The ABA Committee on Professional Ethics has considered the problem posed by these questions, in several opinions of that body.

In Formal Opinion 39, the Committee had before it the following facts. The public prosecutor investigated a possible fire insurance fraud charge against A, and concluded that there was not sufficient evidence to justify the filing of a criminal complaint. Thereafter, A engaged the prosecutor to bring an action to recover the insurance proceeds from the insurance company.

The Committee held that it was professionally improper for the prosecuting attorney to accept the employment, quoting Canon 36, as follows:

"A Lawyer, having once held public office or having been in the public employ, should not, after his retirement, accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

The Committee went on to say:

"If a 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."

In Formal Opinion 135, the prosecuting attorney had investigated an accident case for possible criminal action, but had concluded that no criminal action should be filed. He then proposed to represent one of the parties in the civil damage suit.

The Committee, in ruling that it was improper for the attorney to represent any of the parties to the civil action, reasoned the matter thusly:

"The investigation of the prosecutor was ostensibly in the exercise of official authority. Information was obtained from persons, who may have felt, quite naturally under a sense of coercion or respect for actual or supposed power. The person later sued as a tort feasor may thus have disclosed facts inimical to his best interests in a civil action. Unsuspecting, unshielded, and at a serious disadvantage, he submitted to interrogation by one who later, as opposing counsel in a civil action, might use the knowledge thus acquired against him.

Such approaches by an attorney in private practice are improper; they are calculated to mislead to his prejudice, a part, not represented by counsel . . .

If the lawyer making the approach does so under sanction or color of official power, he thereby more certainly disqualifies himself from later participation as counsel in any civil litigation having its basis in or connected with occurrence previously investigated as to its criminal aspects.

A prosecutor cannot profit by information gained in the course of performance of his duties as a public official. Public policy forbids.

This policy is reflected in Canon 36 which prohibits a lawyer who has once been in public employ, after retirement accepting employment in connection with any matter which he has investigated or passed upon while in such office or employ. It follows, of course, that in a similar situation he cannot accept such employment before retirement.

. . . Even the possibility of conflict should deter a lawyer in public office from engaging in a civil action involving

parties and facts which have been the subject of previous criminal investigation.

The attempted double role is fraught with many conceivable inconsistencies and antagonisms. Public duty and fealty to private clients, involving subordination of the interest of one or the other, may embarrassingly challenge the conscience of the lawyer who attempts to serve both.

In the opinion of the Committee, a prosecutor who accepts employment in civil litigation under circumstances detailed in the inquiry evinces lack of appreciation of general ethical principles, overturns consideration of sound public policy, breaches the specific inhibitions of Canon 36 and thereby subjects himself to public criticism."

In Formal Opinion 134, the Committee said:

"A lawyer retiring from public office cannot utilize or seem to utilize the fruits of former professional relationships in subsequent private practice involving a matter investigated or passed upon either by himself or others off the public legal staff during the time he was identified with it."

Canon 9, DR 9-101(B) has captured the sense of these opinions succinctly. In this section the rule is stated thusly:

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

Except for the fact that the criminal litigation is at an end in the one question, there appears to be little or no distinction in the holding two questions posed, and it would appear that all of the ethical considerations paramount in the references cited have equal application to both questions.

We conclude that the answer to both questions is 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 lead to a criminal action which is at rest, and which he prosecuted.