

FORMAL OPINION NO. 38*-

A request has been made for the opinion of the Committee on the following questions:

May a licensed attorney in Idaho, who is also probate judge of his county:

(A) With respect to criminal proceedings, ethically advise or otherwise defend a defendant:

1. In a prosecution for alleged violation of a federal law?
2. In a prosecution for alleged violation of a criminal law of the State of Idaho where the prosecution is not in his county?
3. In a prosecution for alleged violation of a municipal ordinance of one of the cities or villages of his county?

(B) With respect to civil action, may he ethically advise or represent a party to a civil action:

1. In a justice court in his county?
2. In a district court in his county?
3. In any court in other counties?

(C) With respect to estate matters, may he ethically

1. Draft wills for persons whose estates are apt, upon the death of such persons to be under the jurisdiction of the Probate Court of his county?
2. Otherwise advise persons with respect to matters which upon the death of the persons advised are apt to be adjudicated one way or another by the probate court of his county?

3. Do the legal work with respect to the probate of wills or the admission of estates in probate courts other than in his county?

In Idaho the practice of law by inferior court judges is specifically limited by Idaho Code § 1-1301, Subsection 5:

"Neither the probate judge, probate clerk or any employee in the office of the probate judge shall act as an attorney in connection with the probating of any estate or the conducting of any litigation before the probate judge or probate court, nor charge nor accept any fee for any services, excepting such as are provided by law."

and Idaho Code § 1-1802:

"Judge cannot act as attorney.--A judge cannot act as attorney or counsel in a court in which he is judge, or in an action or proceeding removed therefrom to another court for trial or review, or in an action or proceeding from which an appeal may lie to his own court."

Supreme Court justices and judges of the district court are prohibited from acting as attorney or counsel in any court except where the judge is a party of record. Idaho Code § 1-1803.

It would appear, therefore, that it is contemplated under our law that inferior court judges who are attorneys may practice except as specifically prohibited. However, "A legislature cannot by enacting a statute render ethical that which is inherently unethical. Standards of professional conduct are not matters of legislative determination. They derive from the expressed views of the majority of the profession and ultimate acceptance of those views by the courts." A.B.A. Op. 142.

The problems involved in answering the questions proposed are touched on by many of the professional and judicial canons. The two most closely concerned, however, are Judicial Canon 24:

INCONSISTENT OBLIGATIONS

"A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions."

and Judicial Canon 31:

PRIVATE LAW PRACTICE

"In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

"He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

"If forbidden to practice law, he should refrain from accepting any professional employment while in office.

"He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law."

A strict application of Judicial Canon 24 would seem to bar all legal practice by any judge. The fact that a

judge, in his private practice must support one side of a question of law or fact, might very well influence his decision, at least subconsciously, should the same question be before him as judge.

Though, as stated before, a legislature cannot make ethical that which is inherently unethical, it would seem that in view of the Idaho legislation on the subject and the long-time practice in the state, an answer to the questions posed must depend to some extent upon the degree or extent that the involved canons would be offended.

It is the opinion of the Committee that questions "A" 1, 2 and 3 and "C" 1, 2 and 3 must be answered in the negative. In such specialized practice, there is a greater chance that questions which come before the judge for decision as a judicial officer may be the same or similar to questions upon which he must take one side or the other in representing his private clients.

Further, the two fields being so specialized, we feel that it is probable that his private practice will be enriched by his judicial position. The general public would be apt to feel that a probate judge, whether because of his knowledge in the field resulting from his position or because of his connection with other public officers, is in a better position to promote and protect their legal rights.

This Committee has previously in its Opinion No. 23, ruled that it is not ethically proper for a justice of the peace, police magistrate or probate judge, to either prosecute or defend a criminal action in another court on a case with which such officers have had no previous connection. Though the question raised at that time did not specifically refer to prosecutions under federal law or under municipal ordinances, we feel such situations were included in the query and in the opinion, and the reasoning of Opinion No. 23 certainly is applicable under such situations.

We feel that questions "B" 1, 2 and 3, should be answered in the affirmative. While it is possible that the same reasoning might apply in the situations outlined in No. "B" 1, 2 and 3, there is far less chance that the canons mentioned would be offended, and the loss to the

public in not having inferior court judges with legal training, outweighs the possibility of harm in such cases.

DATED this 1st day of November, 1962.

*This opinion is obsolete. Judicial reform legislation has prohibited judges from practicing law, and judicial conduct is now regulated by the Idaho Judicial Council. See, however, I.S.B. Opinion No. 17 (undated). Idaho Code § 1-1301 was repealed by S.L. 1969, ch. 111, § 10.