

FORMAL OPINION NO. 12*

PERSONAL RELATIONS WITH JUDGES

The Committee has been requested to express its opinion with respect to a situation in which a probate judge desires to study in the office of an attorney who is the only full-time practicing attorney in a county, and is also the elected prosecuting attorney in the county.

The question is as to the propriety of that association with respect to the attorney's work in the court of that probate judge.

We find nothing in the law, or in the Canons of Ethics squarely in point on this question, and our conclusions must therefore be drawn from similar, or related situations which have been covered, and opinions expressed thereon.

Section 1-1804, Idaho Code, provides: "No judge or other judicial officer shall have a partner acting as attorney or counsel in any court of this state."

Under the headings of "JUDICIAL DISQUALIFICATION--KINSHIP TO COUNSEL", and "PROFESSIONAL EMPLOYMENT--KINSHIP TO JUDGE", the American Bar Association Committee has said, among other things, the following:

"A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person." (Canon 13 of Judicial Ethics.)

"It is desirable that he (a judge) should, as far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude in the administration of his judicial duties." (Canon 26 of Judicial Ethics.)

"While neither of these canons specifically covers the situation in question, they embody the basic relevant principles.

"A judge should studiously avoid wherever possible every situation that might reasonably give rise to the impression on the part of the litigants or of the public that his decisions were influenced by favoritism. While the Canons do not preclude a judge from sitting in a case in which a son or other relative is counsel, it is wise in such cases for the judge, where feasible, to have another judge hear the case.

"It is not incumbent on a lawyer to refuse to accept employment in a case because it may be heard by his father or other relative. The responsibility is on the judge not to sit in a case unless he is both free from bias and from the appearance thereof." (ABA Opinion No. 200.)

In Drinker, Legal Ethics, pages 71 and 72, Mr. Drinker discusses the problem of personal relationship between attorneys and judges, and states as follows:

"There is not general rule relative to a judge sitting in a case tried or argued by his former partner, or by the judge's former secretary. Here again the responsibility is on the judge, and not on the lawyer. The practical problem is, of course, different in rural communities from in large cities, and in the former would be influenced by local custom."

We conclude therefore that in the situation before us, the responsibility is that of the judge rather than of the attorney. We feel, however, that the attorney is not entirely relieved of all obligation, and that if there is any possibility that the relationship created, or to be created by the arrangement between them, would, in any manner influence the public, or if either of the parties have any feeling that such influence would be felt because of the association, or if the arrangement would in fact influence the judge in the performance of his duties and obligations, then the relationship should probably not be entered into or maintained.

DATED this 13th day of February, 1959.

DISSENT

Additional considerations of this problem compel a different conclusion.

In this case, the attorney is the mentor of the judge. The latter, not having the benefit of legal training as yet will, in all likelihood learn only such law and ethics as the attorney teaches him. He may neither know, nor because of his position as a layman feel bound by the Canons of Professional Ethics.

Naturally, the judge-student will come to look upon the attorney-tutor as the fountain of legal learning and sagacity.

On that inevitable day when the judge must decide between the position advocated by his instructor as opposed to the position of an "outsider" can the judge impartially and fearlessly deny the man who has led him to such accomplishments as he possesses? It seems unlikely and illogical to expect the pupil to publicly hold the educator wrong--especially during the "years of indenture."

Another concomitant of the relationship is the conscious or unconscious effect upon the public which must deal with the lawyer and the judge. Some may feel they will gain a distinct advantage in having a lawyer so well versed he is "educating" the judge.

What of the probate, juvenile or criminal matter that must come before that judge because there is no other who has jurisdiction? Would a losing litigant in a contested cause blame his downfall to the merits or the cozy relationship between judge and attorney?

It would seem that both the lawyer and judge will bring upon themselves and their official and professional positions some deserved and probably much undeserved condemnation from continuing such relationship.

The Bar has an obligation to cure this anomaly. It should convincingly and successfully prod the Legislature into requiring legal training as a qualification for such positions. Failing in that, it should secure special dispensation to the probate judge or justice of the peace of a small community who wishes to study law to better qualify himself, but who has only the office of the county attorney or other sole practitioner in which to do so. Distasteful as it may seem, perhaps such person ought to be permitted to study by correspondence or extension division. If he can pass the Bar

examination it can't possibly be a disqualification that the postman brought him texts imparting the same knowledge that law school students received from ghost written "canned brief."

*This opinion is obsolete. Judicial reform legislation prohibits judges from practicing law. Also, the Idaho Judicial Council regulates judicial conduct. In relation to an attorney's responsibility, see, DR 9-101(C), Idaho Code of Professional Responsibility.