

Utah Ethics Opinions

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26. USB EAOB Opinion No. 26

Utah State Bar

Ethics Advisory Opinion No. 26

Approved May 11, 1976

Summary: A pro-tem judge may not act as criminal defense counsel in the same court.

Facts: You have posed the question: "May an attorney who serves as a pro-tem judge in a city's court system, trying criminal cases, represent criminal defendants in the same court on the days that he is not sitting on the bench?"

Opinion: In our opinion, the answer to this question is "No." You do not indicate the extent to which you sit as a pro-tem judge, but the implication is that it is regularly, and frequently.

The former Canons of Judicial Ethics (No. 31) said "No" and with particularity:

"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 judge, even when presided over by another judge, or appear therein for himself in any controversy."

Canon 2 of the Code of Judicial Conduct carries this concept forward as follows:

"A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Formal Opinion 142 of the ABA Committee on Professional Ethics passed directly on the point, holding it would be unethical for a pro-tem judge to appear as an

attorney in the court over which he presides.

The present Canons of Ethics reach this question under Canon 9. "A lawyer should avoid even the appearance of impropriety."

Cited with approval and supportive of this principle are former Canons 29 and 32 and ABA Formal Opinion 242 holding that it is improper for a Judge of a lower court whose duties are limited to misdemeanor trials and preliminary hearings in felony cases to represent a client in a felony trial even though he did not act in the matter at the lower court level.

In Formal Opinion 161, the Committee qualified the effect of Opinion 142, holding that a pro-tem judge who served occasionally in aid of the regular judge, might properly appear in that court so long as he appears to utilize his judicial service as a means to foster his professional success and refrains from acting in any situations which create a conflict of interest.

Formal Opinion 242 further clarifies the limitation stating:

"* * * One who assumes to act as a judge on one day and advocate the next in the same judicial system is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system."

Working with criminal court personnel and police, in the close circumstances required in the judicial handling of criminal matters, has an effect upon those persons which would make it difficult for a police officer, for example, to regard a pro-tem judge, acting as counsel, as he would any other lawyer contending adversely to the case he is presenting to the court.

We think the appearance of impropriety and the potential for pressure on police personnel make it inappropriate for an attorney serving as pro-tem judge in city court criminal cases, on a not infrequent basis to also act as defense counsel in city court criminal cases.

If it were an occasional sitting only, we would perhaps conclude differently since the implications would be lessened materially.

Rule Cited:

Canon 2