
**E-69-2 Court commissioner: Appearance
before appointing judge**

This committee was requested to consider whether it is proper for a court commissioner to appear in private litigation before the judge who appointed him. Our opinion is that it is proper for him to do so.

In 22 Op. Att'y Gen. 991, the Attorney General gave an opinion that an attorney who has been appointed a court commissioner may appear at the defense of criminal actions before the judge who appointed him as court commissioner. That opinion stated in part as follows:

No question of incompatibility arises for the reason that incompatibility concerns only public offices. While an attorney is sometimes considered an officer of the court, he is not a public officer as the term is ordinarily understood or as it is used in reference to determining the compatibility of some office with another.

Secs. 256.22 and 256.23, Stats., designate certain things which a court commissioner may not do. These statutes cover a multitude of situations. Neither of them, however, could be considered as prohibiting the practice about which you have raised a question. It would seem that the conclusion should be drawn that the legislature did not intend to prohibit the practice, or it would have indicated it when enacting the exhaustive prohibitions found in secs. 256.22 and 256.23.

Upon principle there is no strong reason for prohibiting a court commissioner who is an attorney from defending a criminal before the judge who appointed him as court commissioner. The court commissioner owes his appointment to the judge. The judge does not owe his appointment to the court commissioner. If either can be said to be in the superior office, it is the judge rather than the court commissioner. There would, therefore, be no tendency or incentive upon the part of the judge to curry favor by showing partiality to the court commissioner practicing before him.

The responsibility is on the judge, and not on the lawyer.

In Formal Opinion 200, the American Bar Association Committee on Professional Ethics held that it is not improper for an attorney to accept professional employment in a case, although it may be tried before a judge who is a relative. That Opinion concluded as follows:

“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.” *See also Drinker’s Legal Ethics*, page 72. It should be noted that in Wisconsin a judge is required to disqualify himself for kinship. Section 256.21 Wis. Stats.

Rule 1 of the Code of Judicial Ethics, promulgated by the Wisconsin Supreme Court, effective January 1, 1968, states:

1. Conflicts of Interest. A judge shall not exercise his duties with respect to any matter in which a near relative by blood or marriage is a party, has an interest, or appears as a counsel. He shall not participate in any matter in which he has a significant financial interest or in which he previously acted as counsel.

Comment

This rule covers those major conflicts of interest which should automatically disqualify a judge. There will be many lesser situations in which the judge’s own sense of propriety may indicate that he disqualify himself. There may also be even lesser situations in which the judge will determine that full disclosure to counsel is adequate.

In the light of this rule, we recommend that in all cases where a court commissioner appears before the judge who appointed him, he disclose this fact to opposing counsel. However, we fail to see why the judge should disqualify himself merely because he appointed the attorney as court commissioner. In Wisconsin it is necessary for other appointees of a judge, such as guardians ad litem and counsel for indigents, to appear in contested litigation before the judge. Also, in 30A Am. Jur. *Judges* Section 140, page 76, it is stated:

A power to appoint and remove officers either as a judge or in another capacity has been held not to be an interest which will disqualify the judge either to hear a proceeding for the removal of such an officer or to try a prosecution brought by him. Thus, he is not disqualified to try a case under a particular law merely because he has designated the prosecuting officer to enforce it.