

FORMAL OPINION NO. 105

Our Committee continues to receive numerous inquiries as to the propriety of an attorney who represents municipalities also defending criminal cases. Coincidentally, the Commissioners of the Idaho State Bar have directed our Committee to review and revise existing Ethics Opinions in light of recent developments in the rules of professional conduct.

We, therefore, take this opportunity to revise and restate the Committee's view on this recurring question. We conclude that except in the case of true conflicts of interest, as specified below, the need to make legal services available to those in need of such services outweighs any apparent conflict of interest created by a part-time city attorney acting as defense counsel in other cases. This opinion, therefore, supersedes prior Opinions Nos. 41 (1963), 51 (1971), 85 (1973) and 90 (1975).

We believe that an attorney engaged predominantly in the private practice of law who also represents municipalities and who complies with DR 5-105(C) may defend any person accused of a crime in any court except:

1. When the alleged criminal conduct occurred within the boundaries of the represented municipality; or
2. When police officers or other city agents participated in the investigation of the alleged crime or the arrest of the defendant; or
3. When, by virtue of his representation of the municipality, the attorney has learned facts related to the case or has discussed the case with city officials, police officers or other agents; or
4. When the attorney in his capacity as city attorney has previously prosecuted the defendant or member of his immediate family; or
5. When other circumstances would result in obvious violation of the disciplinary rules.

To comply with DR 5-105(C), the attorney must disclose to the municipality his intent to represent criminal defendants and must disclose to each defendant his representation of the municipality. Each must be apprised of the possible effect of such representation on the exercise of his independent judgment, and each must consent to the multiple representation.

The rule set forth above is not a radical departure from our prior opinions. When taken together, our previous opinions held that an attorney who represents municipalities may also represent criminal defendants when appointed by a court, but he may not accept criminal cases by retainer. Our prior opinions recognized that the need to provide defense services to indigents outweighed any apparent conflict of interest. ". . . The duty to defend indigents charged with crime outweighs the apparent conflict of interest where a city attorney defends criminals in other courts." I.S.B. Formal Opinion 41 (1963).

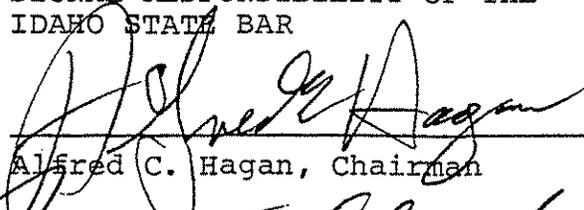
We now abandon the distinction between court-appointed and retained cases. A person accused of crime has a need for defense services which is equally compelling, regardless of whether he is indigent or can afford an attorney. Moreover, any apparent conflict of interest created by the multiple representation will exist, regardless of whether the part-time city attorney is appointed or retained in a criminal case. Similarly, many Idaho municipalities can neither afford nor need a full-time city attorney. Municipalities, having the status of persons under the law, also need legal representation. If representation of a city would prevent a lawyer from defending criminal cases, some attorneys might decline the opportunity to represent a city.

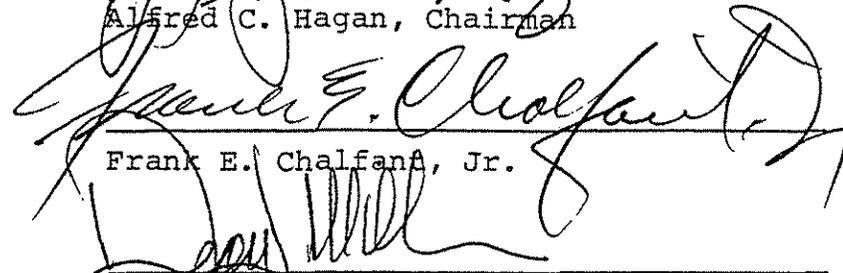
Our reformulation of the rules announced in prior opinions is motivated by our perception that one of the primary obligations of the Bar is to make legal services fully available. See, Ethical Consideration 2-1; ABA, "Report of the Special Committee on the Availability of Legal Services" (1972). The State Bar Association should not impose restrictions on the availability of services except for significant reasons.

Accordingly, we believe that except in the cases of actual conflict of interest specified above, the multiple representation contemplated hereby is permissible.

DATED this 14th day of August, 1981.

COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY OF THE IDAHO STATE BAR


Alfred C. Hagan, Chairman


Frank E. Chalfant, Jr.


Dean J. Miller