

OPINION NO. 133

The question posed to the Committee is whether a county prosecutor may undertake criminal defenses in another county. This question, together with the analogous question of whether a municipal attorney may defend in other counties, in one form or another, has been posed numerous times to this Committee. The answers have been based upon either the prior Canons of Ethics, or Disciplinary Rules. As a result of the 1986 adoption of the Idaho Rules of Professional Conduct, the Committee felt that it would be appropriate to reexamine these questions and the related one of what private civil representations a county or municipal attorney may undertake.

A conflict of interest arises when the attorney undertakes to represent a client who has an interest which is adverse to either: (1) a different client; or (2) to a third person to whom the lawyer has some responsibilities; or (3) the lawyer's personal interests. I.R.P.C. 1.7 (a & b). In most instances determining who the client is poses no difficulty. This has not always been true when discussing who is the municipal or county attorneys' client.

Prior court decisions and committee opinions, from Idaho and other jurisdictions, have taken a very restrictive view of what an attorney, who is employed by a governmental entity may do when representing private clients. Various rationales have been relied upon. They include such concepts as: the client is the general public, and because the public can not be polled, it can not consent to a conflict; it would have the appearance of an impropriety; or, by allowing the representation, public confidence in the legal system would be undermined. These all contain a basic philosophy, stated or unstated, that the general public, not an individual governmental entity, should be considered as the client. See, e.g., Idaho Ethics Opinions, 10, 50, 53, 60, and 74.

Construing "client" in such broad terms could lead to ludicrous and probably unintended results. As an example, if the public is the client, and a private attorney provided part time representation to the Idaho State Board of Medicine, the attorney would automatically be barred from doing any criminal defenses in Federal Court. There is no question that the general public is represented by both the State Board of Medicine and the U. S. Attorney's office. Therefore, a defense in Federal Court would conflict with

the general public's interest. To avoid this type of extreme result, the Committee adopts a more limited definition of "client." The Committee reaches its result based on the Idaho Rules of Professional Conduct. The Rules do not provide a definition, but they do give guidance.

Idaho Rule of Professional Conduct 1.11 provides that "A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally or substantially as a public officer or employee, unless the appropriate government agency consents after consultation." This rule recognizes, in the instance of an attorney going from government to private employment, that the client is not the general public. Rather, the client is the agency for whom the services were provided. This appears to be the more sound and workable definition of "client."

The more narrow definition of "client" permits an attorney to ascertain when a conflict occurs and if that conflict is between two clients, one client and a third party, or one client and the attorney's own interests. After that determination is made, the remaining sections of I.R.P.C. 1.7 delineate under what circumstances an attorney may continue the representation, in spite of a conflict.

Subparagraph (a) of I.R.P.C. 1.7 controls the situation where there is a conflict between two clients. The first criteria under this subparagraph is that both clients must consent to the conflicting representation.

Subparagraph (b) of I.R.P.C. 1.7 controls the situation where there is a conflict between the client and the attorney's personal interests or responsibilities to a third party. This provision requires only the client, not the third person, to consent to the representation. That is, under subparagraph (b) no consent is required from a third person to whom the attorney also owes a duty.

Obtaining the requisite consent is not sufficient to permit the attorney to undertake the representation. The attorney must still exercise reasonable judgment before proceeding. Where the conflict is between two clients, I.R.P.C. 1.7 (a) states the attorney may not proceed unless he "reasonably believes the representation will not adversely affect the relationship with the other client;...." In a situation where one client's interest conflicts with responsibility to a third person or the attorney's own interests, I.R.P.C. 1.7 (b)(1), states the attorney may not proceed unless he "reasonably believes the representation would not be adversely affected...."

The result of the more narrow definition of "client," and the application of I.R.P.C. 1.7 is illustrated by the

following examples. In these examples, it is important to first define the scope of the representation the attorney is providing, i.e., criminal or civil.

I

The Prosecuting Attorney for Alpha County elects to defend in Beta County. There is a conflict between two clients because he represents the State of Idaho in Alpha County, and will be representing the defendant against the State of Idaho in Beta County. He would need to obtain the consent of both the State of Idaho¹ and the defendant before undertaking the defense in Beta County. If he did obtain the consents, he could proceed only if he believed the representation of the defendant would not adversely effect his relationship with the State of Idaho.

II

An attorney who prosecutes, but does not do civil work for Alpha County, has a client who wants to bring a civil action against Alpha County. The attorney does not have a conflict between two clients because Alpha County only pays him to represent the State. However, it appears that the attorney would have a conflict between the client and the attorney's responsibility to Alpha County, and, if not, then between the client and the attorney's own self-interest.

Although the attorney prosecutes for the State, he has a responsibility to see that the criminal law is enforced within Alpha County. To fulfill the responsibility, he must cooperate with other county officials and employees. It would be unreasonable for him to think that his representation of the civil client would not be adversely affected by the need to maintain a good

1. When the conflict involves an agency, I.R.P.C. 1.11 states it is the agency from whom the consent is to be sought. There is no similiar direction when an agency is not involved, such as in a criminal prosecution. In the latter case, various ideas have been advanced as to who may consent to a conflicting representation. These include that only the Governor can, the Attorney General can and possibly the attorney who is representing the State in a particular case. The Committee believes, that the answer to that question will turn on a statutory interpretation, which is not within the Committee's province.

working relationship with the personnel of the county he is suing.

In the unlikely event the attorney did not recognize a conflict between the client and his responsibility to Alpha County, he would have to recognize one between the client and the attorney's own interest in not antagonizing Alpha County to the extent he would lose the prosecuting attorney position. Therefore, even if the client consented, an attorney could not reasonably believe the representation of the civil client would not be adversely affected.

III

A municipality in Alpha County has an attorney who does only civil work. He wants to defend a criminal case in Alpha County. There is no conflict between two clients, because he does not represent the State. Depending on the nature of the relationships the municipality has with the State and Alpha County, there may be a conflict between the client and the attorney's responsibility to the municipality, or between the client and the attorney's own personal interests in continuing to represent the municipality. The closer or more interdependent the relationships, the more likely there will be a conflict.

A related issue to be dealt with arises under I.R.P.C. 1.8 (b). This Rule states "A lawyer shall not use information relating to representation of a client to the disadvantage of the client [unless the client] consents after consultation." (The bracketed language was inadvertently omitted from the Rule.) When a prosecutor wants to undertake a defense, he may not only have to obtain a consent to the conflict, but also he may have to obtain a consent to use information learned while prosecuting. As an example, if while prosecuting for Alpha county, he learned of a defect in blood-alcohol measuring equipment, he may wish to use that information for a defense in Beta county. That would be prohibited unless that knowledge was disclosed, and the appropriate consent obtained.

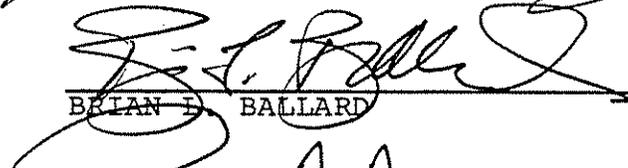
Under the Committee's analysis, the Idaho Rules of Professional Conduct do not categorically prohibit a prosecuting attorney for a county or municipality from undertaking defenses in another county, nor from bringing civil actions which involve a governmental entity. However, the Rules make it quite clear the appropriate consents must be obtained, and, even with a consent, the attorney must exercise reasonable judgment before undertaking the

representation. Particularly in this area, where courts and committees have been quick to find unwaivable conflicts, the attorney should use utmost caution before proceeding.

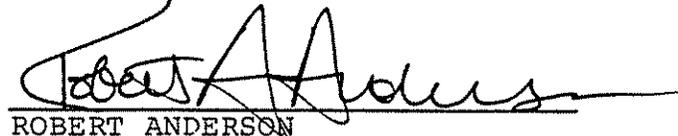
1 Oct. 90
DATE


JOHN K. LOOZE, Chairman

10/5/90
DATE


BRIAN E. BALLARD

10/8/90
DATE


ROBERT ANDERSON