

FORMAL OPINION 129

The Committee has been asked to address an issue which most every attorney has faced. Is it an ethical violation to advise clients about the procedure and conduct of trials in Small Claims Court?

The problem occurs because of the broad language in the Small Claims Act. Idaho Code §1-2308 states "No attorney at law --- shall concern himself or in any manner interfere with the prosecution or defense of such litigation in said department, ---." Strictly construed, this could prevent an attorney from even advising about the existence of Small Claims, much less advising a client how to proceed in Small Claims or present evidence at a trial.

The two Idaho Rules of Professional Conduct that most directly impinge on this issue are IRCP 8.4(d) which provides that "It is professional misconduct for a lawyer to: ---(d) engage in conduct that is prejudicial to the administration of justice; ---." and IRCP 3.4(c) which states "A lawyer shall not: ---(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; ---."

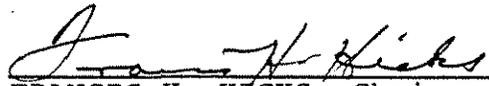
Advising a client about Small Claims procedure and the conduct of a trial in Small Claims is quite possibly a violation of I.C. §1-2308. If it is, it would also violate IRCP 8.4(d) by interfering with the administration of Small Claims. This violation would have to be viewed, however, in relationship to IRCP 3.4(c).

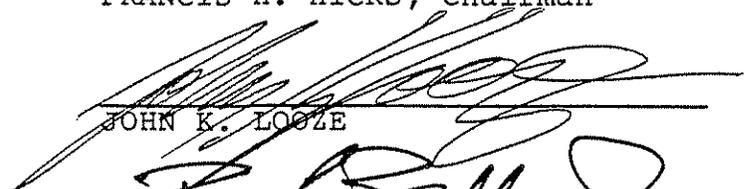
Rule 3.4(c) recognizes that a lawyer may refuse to obey the rules of a tribunal if it is done openly and in the belief that no valid obligation exists for him to follow those rules. Therefore, if a lawyer believes that he has a right to advise his clients about the procedures and trials in Small Claims, and he notifies the Small Claims Court of that belief and his intention not to comply with the rules, the attorney will not be engaging in unethical conduct when he gives this advice to his clients. Although this procedure would insulate the attorney from an unethical conduct charge, it does not insulate him from a contempt of court proceeding before a Judge who believes the conduct is a violation of I.C. §1-2308.

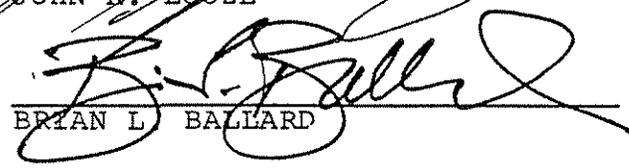
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<sup>1</sup>The Committee notes that the scope of an attorney's participation in Small Claims matters has been the subject of litigation, an amendment to the Idaho Rules of Civil Procedure

and a Formal Ethics Opinion. In Foster vs. Walus 81 ID 452, 347 P2d 120 (1959) I.C. §1-2308 was attacked as a denial of due process. Therein, the Idaho Supreme Court held it was not a denial because there was a right to a trial de novo. See also Frizzell vs. Swafford 104 Id 823, 663 P2d 1125 (1983). Rule 81(d) of the Idaho Rules of Civil Procedure was amended to permit an attorney to assist in post-judgment Small Claims proceedings. The amendment follows this Committee's Formal Opinion 120, which stated that assisting a client in obtaining an execution of a Small Claims judgment was not an ethical violation because the case had been completed. That opinion would probably have been better founded had it not attempted to construe the I.C. §2308, but rather applied the Idaho Rules of Professional Conduct, as is done herein.

  
FRANCIS H. HICKS, Chairman

  
JOHN K. LOOZE

  
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