

IDAHO STATE BAR
FORMAL ETHICS OPINION NO. 137

September 18, 2024

The Office of Bar Counsel received multiple requests to address issues related to the transition to the State Public Defender system. Those questions are generally summarized as follows:

Question 1: Can a reduction in a lawyer’s compensation create a financial issue for the lawyer that may result in a potential conflict of interest?

Answer: Yes.

Question 2: Must a lawyer seek withdrawal from a pending case if there is a significant risk that the lawyer’s representation of a client will be materially limited due to a financial personal interest conflict of interest?

Answer: Yes.

Question 3: If a tribunal denies the lawyer’s motion to withdraw, must the lawyer continue representing the client?

Answer: Yes.

BACKGROUND FACTS

Public defense in Idaho was long handled through a county-based system. Each county set the pay for Idaho lawyers handling public defenses cases. The Office of Bar Counsel understands that some counties pay lawyers handling public defense cases at different rates than other counties.

In 2023, the Idaho State Public Defender (“SPD”) Office was created to manage all public defense in Idaho through one state agency, beginning on October 1, 2024. The SPD staff worked closely with the Idaho Department of Human Resources to set the salary structure for lawyers transitioning from the county system to becoming SPD employees. According to information from the SPD’s website, based on the SPD budget for fiscal year 2025, about 77% of SPD employees will receive a salary increase from what they made through the county-based system. Seven percent (7%) of SPD employees’ salaries will remain the same as their county pay rate, while 15% of SPD employees’ salaries will decrease from their current county pay rate.

For purposes of this Opinion, we assume that the substantive work of the lawyers handling public defense cases remains the same, i.e., the change from a county-based system to a state-based system does not change the scope of work performed by public defense lawyers in Idaho.

The Office of Bar Counsel has been informed that public defense lawyers who choose not to accept positions with the SPD's office, but who will handle public defense cases on or after October 1, 2024, may have to negotiate contracts with the SPD. Those contracts will, presumably, provide for pay consistent with the pay rate for lawyers employed directly by the SPD.

Lawyers considering public defense work whose pay rates will decrease from their current pay rate face ethical considerations regarding whether their personal financial circumstances may impact their ability to represent their clients. This conflict analysis applies to lawyers who have been appointed, who have a contract with the SPD, or who are SPD employees.

DISCUSSION

Question 1: Can a reduction in a lawyer's compensation create a financial issue for the lawyer that may result in a potential concurrent conflict of interest?

Answer: Yes.

Idaho Rule of Professional Conduct ("I.R.P.C.") 1.7 addresses concurrent conflicts of interest and provides:

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

The relevant analysis for this question involves the personal interests of the lawyer under I.R.P.C. 1.7(a)(2). Comment 10 to I.R.P.C. 1.7 states, in relevant part: “The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.” The Comments are also instructive on how a lawyer should resolve a potential conflict of interest:

Resolution of a conflict of interest problem under I.R.P.C. 1.7(a)(2) requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.

Comment 2 to I.R.P.C. 1.7.

Lawyers whose financial compensation will decrease from their current county pay rate face a potential concurrent conflict of interest. The lawyer must assess whether there is a significant risk that their representation of clients will be materially limited due to their own personal financial interests, i.e., a reduction in pay rate to perform the same legal services. If the lawyer determines that there is a significant risk that their representation of one or more clients will be materially limited because of their own personal interests, then the lawyer has a concurrent conflict of interest under I.R.P.C. 1.7(a)(2).

Some conflicts may be consentable under I.R.P.C. 1.7(b). However, each subpart of I.R.P.C. 1.7(b) must be met for a lawyer with a concurrent conflict of interest to continue the representation. I.R.P.C. 1.7(b)(1) requires the lawyer to reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client notwithstanding the concurrent conflict of interest. This may be difficult for a lawyer to “reasonably believe” when the conflict of interest involves the lawyer’s personal financial interest. If the lawyer does not reasonably believe that they can provide competent and diligent representation due to their own personal financial circumstances, informed consent from each affected client in writing under I.R.P.C. 1.7(b)(4) will be ineffective to allow the representation to continue because I.R.P.C. 1.7(b)(1) cannot be met in that instance.

Question 2: Must a lawyer seek withdrawal from a pending case if there is a significant risk that the lawyer's representation of a client will be materially limited due to a financial personal interest conflict of interest?

Answer: Yes.

When a concurrent conflict of interest is not consentable under I.R.P.C. 1.7(b), the lawyer must look to I.R.P.C. 1.16 to assess whether they may ethically continue representing the client.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the rules of professional conduct or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by

a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

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A concurrent conflict of interest *requires* the lawyer to withdraw under I.R.P.C. 1.16(a)(1) because the continued representation will result in a continuing violation of I.R.P.C. 1.7(a)(2). This is different than when withdrawal is *permissible* under I.R.P.C. 1.16(b), such as when representation will result in an unreasonable financial burden on the lawyer. *See* I.R.P.C. 1.16(b)(6). The fact that a lawyer is appointed to represent an indigent client in a public defense matter does not change the requirement to withdraw under I.R.P.C. 1.16(a)(1).

Appointment of counsel is addressed by I.R.P.C. 6.2, which requires lawyers to not seek to avoid appointment by a tribunal except for good cause.

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Good cause for declining appointment by a tribunal to represent a person under I.R.P.C. 6.2(a) – representing the client is likely to result in a violation of the Idaho Rules of Professional Conduct or other law – is similar to the language requiring mandatory withdrawal under I.R.P.C. 1.16(a)(1).

A lawyer with a personal interest conflict may ethically seek to avoid appointment by a tribunal under I.R.P.C. 6.2(a) because representing the client is likely to (and will) result in violation of I.R.P.C. 1.7(a)(2).

Question 3: If a court denies the lawyer's motion to withdraw from a case, must the lawyer continue representing the client?

Answer: Yes.

Even when a lawyer may be required to withdraw from the representation under I.R.P.C. 1.16(a)(1), the lawyer *must* comply with the applicable law requiring notice to or permission of a

tribunal under I.R.P.C. 1.16(c). In a criminal case, this will require the lawyer to comply with Idaho Criminal Rule 44.1.

Courts have broad discretion in whether to grant a motion to withdraw. If a court denies the lawyer's motion to withdraw from the case, even if the lawyer's request to withdraw is due to a clear conflict of interest, the lawyer must continue to represent the client. "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." I.R.P.C. 1.16(c).