

FORMAL OPINION NO. 31*

1. In a civil action brought against a deputy sheriff within the provisions of Section 6-610, Idaho Code, wherein the county is also named a defendant, may the prosecuting attorney from the same county accept employment from said defendant and/or the insurer of the county or state, in his private capacity?

2. If the answer to the above question is ever "yes", how are the attorney fees collected and charged?

In Idaho a prosecuting attorney may also maintain a private practice; however, this right is limited by Section 31-2606, Idaho Code.

Prohibitions.--No prosecuting attorney must receive any fee or reward for or on behalf of any prosecutor or other individual for services in any prosecution or business to which it is his official duty to attend to discharge; nor be concerned as attorney or counsel for either party other than for the state, people or county, in any civil action depending upon the same state of facts, upon which any criminal prosecution commenced but not determined depends, and no law partner of any county attorney must be engaged in the defense of any suit, action or proceeding, in which said prosecuting attorney appears on behalf of the people, state or county. (1897, p. 74, §5; reen. 1899, p. 24, §5; am. and reen. R.C. & C.L., §2084; C.S., § 3657; I.C.A., § 30-2106).

The Canons of Ethics and public policy further limit the privilege of engaging as counsel in a civil action based on substantially the same facts which he, in his official capacity, has investigated for the purpose of determining criminal responsibility. (Opinion 135, American Bar Association; I.S.B. Op. 18).

Among the duties of the prosecuting attorney imposed by statute, are the following:

"31-2604. Duties of prosecuting attorney.
It is the duty of the prosecuting attorney:

1. To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people, or the state, or the county, are interested, or are a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county. . . ."

It does not appear that the prosecuting attorney is required in his official capacity to represent a deputy sheriff in a civil action brought under Section 6-610, Idaho Code, but it would appear that he is required to represent the county or state in said actions, which would be a bar to his accepting employment in his private capacity.

In this type of case the county is named a defendant by the plaintiff in order to recover against the public liability insurance the county may carry on its employees. Section 41-3305, Idaho Code, as amended, waives the immunity of the state or county to the extent of liability insurance carried.

In Pigg v. Brockman, 79 Idaho 233 at 245, the Idaho Supreme Court stated:

". . . The state is immune and cannot be made liable to pay any judgment which may be entered, nor any of the expense of defending the action. However, in view of the stipulation in the policy that the insurer cannot be sued until the amount of liability has been determined in an action against the insured, the state must continue as a nominal party defendant for the purpose of trial and judgment in order that the liability of the insurer, if any, may be thus determined and fixed. If a verdict is returned against the state the judgment entered thereon must in terms provide that the state is not liable therefor, nor for any costs or expenses involved in the action, and that the judgment determines the liability of the insurer and fixes the amount of such liability, within the limits of the policy. . . ."

In these cases the state or county is only a nominal party defendant for purpose of trial or judgment, and in

fact the real defendant is the insurance company. We do not believe in such cases the prosecuting attorney should be precluded from representing either the deputy sheriff or the insurance carrier, or both, providing that he is not otherwise precluded from acting for the ethical reasons first stated herein regarding the investigation of facts for the purpose of determining criminal liability.

In deciding whether he should accept private employment in these cases, the best rule for the prosecutor to follow is that if he is in doubt as to the propriety, he should refuse the employment. The decision as to the propriety of the prosecutor to act should be made prior to trial, and in case of dispute, the committee feels it should be properly decided by the trial court.

In the particular case submitted to us, it does not appear that the propriety of the prosecuting attorney to represent the deputy sheriff and/or the insurer was raised until after the case had been sent to a jury and a verdict returned for the defendants. From the limited facts given to the committee, it does not conclusively appear that this was a case, on its facts, which precluded the prosecutor from accepting private employment. In any case, the question should have been raised and determined before trial--not after. We see no ethical reason in the submitted case why the District Court should not award the defendants a reasonable attorney fee to be assessed against plaintiff's bond.

In the type of case in question, when the prosecutor may properly accept private employment, to whom does he look for his fee?

Is he limited to the amount set by the Trial Court?

In any case in which the prosecutor may properly accept private employment, he is as free to negotiate with his clients for the amount of his fees and method of payment as any other private attorney.

The attorney fees the Court may award a successful defendant in a civil action brought under Section 6-610, Idaho Code, are the amount determined by the Court that might properly be charged against plaintiff's bond. If the Court awards more than the amount the attorney would receive in his private contract with his client, the

attorney, of course, is not allowed to split this fee with his client. However, if the Court should allow less than the amount due the attorney under his agreement with his client, the Court is not attempting to limit the total fee an attorney may charge his client in this type of action any more than in a mortgage foreclosure action or any other action in which the Court sets the fee. All the Court is actually doing is setting the amount of fee to be imposed against the losing party.

DATED this 9th day of November, 1961.

*Idaho Code § 6-903 is the presently applicable section regarding waiver of governmental immunity. See also, Idaho Code § 31-3113 providing that in certain counties prosecuting attorneys are required to devote full-time to their duties as prosecuting attorneys.

See, DR 8-103 and DR 9-101(B), Idaho Code of Professional Responsibility.