

ETHICS OPINION NO. 118

The Ethics Committee has been requested to render an opinion on questions involving a situation where the husband practices privately with a firm, and his wife is a Judge's Court Clerk; that is, she is not an attorney acting as a law clerk. The questions posed to the Committee are whether the husband may practice criminal law before the Judge, and what consents does he need to obtain from the client and the prosecutor to practice before the Judge.

The Committee does not believe that the attorney must limit his practice in front of the Judge, nor is he required to obtain consents from either his client or opposing counsel. See Idaho State Bar Opinion No. 64. The Idaho Rules of Professional Conduct require a lawyer, in limited situations, to disclose and obtain a consent before proceeding with a representation. However, the only consent a lawyer is ever required to obtain, under the Idaho Rules of Professional Conduct, is from his own client.

Although there are several instances in the Rules where the lawyer must make a disclosure and obtain a client's consent before proceeding with representation, the only Rules that have any relevancy to these questions are IRPC 1.7 and 1.8. These are the basic provisions defining when there is a conflict of interest, and the lawyer's duties when a conflict occurs.

Generally, Rules 1.7 and 1.8 require that the lawyer not represent a client if the representation conflicts with the lawyer's own self-interest or a duty he owes to either another client or a third person. If one of those situations arises, the Rules require the attorney to make a disclosure to, and receive a consent from, the client. There is no requirement to make a disclosure to, or obtain a consent from, a third person. The questions presented must, therefore, be examined in light of whether the lawyer's representation of his client would be affected by either his own self-interest or a duty to a third person.

The lawyer's own interests would not be in conflict with the representation of the client. As in any other case, the lawyer's only interest would be in representing the client to the best of the lawyer's ability. The lawyer would have no less and no more self-interest, under the facts posed, than in any other case.

The third persons involved would be the Judge, prosecuting attorney, and the lawyer's own spouse. With regards to the spouse, IRPC 1.8(i) describes the only

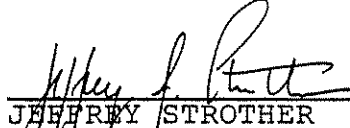
circumstances where a conflict of interest arises because a lawyer's spouse is involved. The Rule states that a conflict occurs if the lawyer's spouse represents another client in a matter directly adverse to the lawyer's client. In this instance, the spouse is not a lawyer, and she does not represent an adverse interest.

The obligations of a lawyer to opposing counsel are prescribed by IRPC 3.4, "Fairness to Opposing Party and Counsel." Under the rule, there is no requirement for an attorney to make any type of disclosure to opposing counsel.

The lawyer's duty to the Court is controlled by IRPC 3.5, "Impartiality and Decorum of the Tribunal." This rule prohibits the lawyer from ex parte communications and seeking "to influence a Judge, a juror, a prospective juror, or other official by means prohibited by law." This Rule would prohibit the lawyer from attempting to use his spouse's position, as a Clerk of the Court, to improperly influence or have any ex parte communications with the Judge. The Rule does not, however, require any disclosures.

Reference should also be made to Canon 3B.2 of the Code of Judicial Conduct. This Canon states a Judge should require its staff and court officials, subject to the Judge's discretion, direction and control to observe the standards of fidelity and diligence which apply to the Judge.

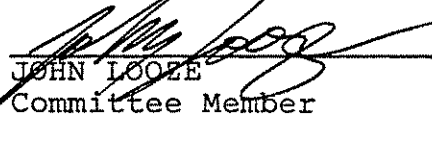
Even though the Committee's opinion is that the Idaho Rules of Professional Conduct do not require disclosures, the Committee believes that a lawyer would not be remiss if he exercised professional courtesy and made the disclosures. The Idaho Rules of Professional Conduct no longer prohibit "an appearance of impropriety," but as a matter of professionalism, it is still a standard worth subscribing to.



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