

Public Defense Reform Interim Committee

Overview of Conflicts and Conflict Counsel

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General Overview

- 1) Is there a conflict of interest?
- 2) If so, it is imputed to the public defender's office.
- 3) Whether circumstances exist, on a case-by-case basis, to justify asking the district court to determine the conflict is not imputed.
(My understanding is this is relatively rare, for good reason.)

I.R.P.C. 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.**

I.R.P.C. 1.7 Commentary

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest 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. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

I.R.P.C. 1.7 Commentary

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.

I.R.P.C. 1.6 governs confidentiality, I.R.E. 502 addresses attorney-client privilege.

I.R.P.C. 1.8 (b): CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

6th Amendment right to effective assistance of counsel is also a consideration.

Imputation of Conflicts

- ▶ Most conflicts are imputed to other lawyers associated in a firm, unless it is a personal interest conflict.
- ▶ **I.R.P.C. 1.10**

I.R.P.C. 1.0 (c): Definition of “Firm”

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

Two Idaho cases address when public defender conflicts are imputed to other members of their office and depart from I.R.P.C. 1.10.

State v. Cook, 144 Idaho 784, 171 P.3d 1282 (Id. App. 2007)

State v. Severson, 147 Idaho 694, 215 P.3d 414 (2009)

The *Cook* Court concluded that rather than adopt a per se rule that the conflict is imputed to the other member of the public defenders' office, as I.R.P.C. 1.10 provides, it was more appropriate to determine on a case-by-case basis whether, “the circumstances demonstrated a potential conflict of interest and a significant likelihood of prejudice” and if so, “the presumption of both an actual conflict of interest and actual prejudice will arise without the necessity of proving such prejudice.” 144 Idaho at 793, 173 P.3d at 1291. The *Cook* Court rationale for the apparent exception to the Idaho Rules of Professional Conduct was essentially that (1) concurrent representation by public defenders generally will create no incentive (economic or otherwise)

for diminished advocacy in such cases and (2) a per se rule imputing conflicts of interests to affiliated public defenders would potentially deprive defendants of competent local public defenders. 144 Idaho at 794, 173 P.3d. at 1292.

Building on *Cook*, in *Severson*, the Idaho Supreme Court clarified when public defenders' conflicts of interest will be imputed. The Court held that whether public defender conflicts are imputed to the entire office is to be determined on a case-by-case basis. In essence, the Court determined that a public defenders' office does not fall within the definition of a "firm" under Idaho Rule of Professional Conduct 1.0. The *Severson* Court explained that to make the determination whether conflicts are imputed, the district court, and presumably, before the matter is presented to the district court, the public defender, is to

determine whether the circumstances demonstrate a potential conflict of interest and a significant likelihood of prejudice. 147 Idaho at 706, 215 P.3d. at 426. Finally, the Severson Court indicated that in assessing the significant likelihood of prejudice, screening or other protective measures undertaken by public defenders are to be considered by the courts. 147 Idaho at 707, 215 P.3d at 427.

Given that a defendant has a Sixth Amendment right to be represented by conflict-free counsel, and the trial court's affirmative duty to inquire into a potential conflict of interest whenever it knows or reasonably should know that a particular conflict may exist, public defenders should disclose potential conflicts of interest to the trial court to assure that the trial court may conduct the hearings mandated by case law and *Severson* to determine whether the circumstances demonstrate a potential conflict of interest and whether a significant likelihood of prejudice exists. Failure to bring potential conflicts of interest to the trial court's attention may result in a basis of appeal, claims of ineffective assistance or disciplinary grievances.