

FORMAL OPINION NO. 74\*

The Committee on Professional Ethics has been asked for an opinion on the following question:

May an attorney, who is also a prosecuting attorney, represent a private client for the purpose of initiating a suit against the State of Idaho seeking a declaratory judgment in an action that challenges the constitutionality of an Idaho statute. The prosecutor's office has not been connected in any way with the facts, investigation or matters relating to the proposed action.

The question may overreach ethical considerations, but the Committee believes it would result in a conflict of interest or at least in the appearance of such a conflict for an attorney, who is also a prosecuting attorney or in the Attorney General's Office, to represent a private individual in a suit against the State of Idaho.

Section 31-2604, Idaho Code, makes it the duty of the prosecuting attorney "to prosecute or defend all actions, applications or motions, civil or criminal, in the District Court (also Magistrate's Division) of his county in which the people, or the State, or the County are interested, or are a party."

The loyalty oath taken by every public officer requires that the officer support the Constitution of the United States, and the Constitution and the laws of this State. (§ 59-401, Idaho Code.)

If the attorneys who represent the state, or the people, challenge the constitutionality of a particular statute, then who shall defend it? It appears that the applicable statutes place both the Office of the Attorney General and of the Prosecuting Attorneys in a similar position, at least to the extent that it would be entirely inappropriate for one to represent against the other. The fact that the prosecuting attorney is permitted to engage in private practice and would be acting as a private

attorney in the case, does not avoid the apparent conflict of interest. The undesired effect of a prosecutor representing against the state or its duly enacted laws is somewhat the same as when a prosecuting attorney would represent a defendant in a criminal case pending in another county. Because he holds a public office, we believe the officer must conduct his private practice so that it would never seem to be inconsistent with his duty as prosecutor to uphold the law as it is enacted by the legislature.

DATED May, 1974.

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\*See, DR 5-105, Idaho Code of Professional Responsibility; I.S.B. Opinion No. 91 (September 30, 1975).