

FORMAL OPINION NO. 91*

The opinion of the Committee has been asked on the following question:

Does a violation of the Code of Professional Responsibility occur when the Attorney General, acting as the chief legal officer of the State of Idaho, represents two opposing entities of state government in an active litigation, thereby appearing for and representing both the plaintiff and defendant?

That separate departments of the state or its officers might have occasion to apply to the courts for settlement of conflicting or apparently conflicting interests evidently was not contemplated by the Legislature in its adoption of various statutes which involve the Office of the Attorney General.

The Committee does not wish to attempt any resolution of possible conflicts between the statutory duties imposed upon the Attorney General or his office and such attorneys' duty under the Code of Professional Ethics. We hope and trust that the statutes do not put that state officer in the impossible position of having to either violate his statutory duty or the Code of Professional Ethics.

DR 5-105 of the Code of Professional Responsibility would appear to be applicable to the question. Clearly under the above cited code provision, one member of a firm cannot oppose what another member of the firm represents. The question clearly indicates a conflict of interest and for which there is considerable historical reference available under interpretation of Canon 6 of our former applicable Canons of Professional Ethics, the essential provisions of which are substantially restated in the above cited rule of the Code of Professional Responsibility. Canon 6 of the Canons of Professional Ethics reads in part as follows:

"It is unprofessional to represent conflicting interests, except by express consent of

all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

It has been previously determined that where the public is concerned no question of consent can be involved because the public cannot consent.

There are many opinions of the American Bar Association Committee on Professional Ethics and Grievances interpreting Canon 6, as it relates to prosecuting attorneys or state officers but none that deal directly with the question stated above. Among other opinions of said Committee which we find of particular interest, we note that it has been held that an attorney cannot ethically:

- (a) Represent two parties to a controversy whose interests are antagonistic (Formal Opinions 60, 222, 241)
- (b) Attack the validity of a document he has previously prepared which was intended to be legally effective (Formal Opinions 64, 71, 72 and 177).
- (c) Sue one whom he has represented as attorney in the same matter (Formal Opinion 167).
- (d) Recommend counsel for an adverse party (Formal Opinion 235).

It is recognized that an attorney general or his staff members might properly be involved in the resolution of legal problems arising among or between state officers or state agencies without violating the provisions of the Code of Professional Responsibility as long as the effort of the Attorney General or his staff members is in the common interest and welfare of the public, but when one of such parties resort to the aid of the courts or wish

to submit a bona fide issue to the court or courts for resolution, it is the opinion of the Committee that the Attorney General or his staff members should participate only on one side or the other as he may determine most appropriate under the applicable statutes.

DATED this 30th day of September, 1975.

*See, I.S.B. Opinion No. 74 (May, 1974).