

FORMAL OPINION NO. 55\*

From your letter, we understand that your partner has accepted the public defender assignment for your county and though you do not take part in any of the cases assigned to him as public defender, you do represent several paid clients in criminal matters who do not qualify for your partner's service under the public defender program. This being your situation, you have asked, if it is possible, that the Professional Ethics Committee reconcile the provisions of § 19-860, Idaho Code, which provides that a "public defender may not engage in the practice of criminal law other than in the discharge of the duties of his office, . . ." with the quotation from an ABA ethics opinion which we cited recently in an informal opinion to the effect that all members of a firm are prohibited "from accepting any employment that any one member of a firm is prohibited from taking."

Our earlier opinion concerned the resulting "conflict of interest" (the subject of Canon 6 of the Canons of Professional Ethics) where one partner represents defendants in criminal cases while another member of the firm acts as a prosecuting attorney. In the main, the prohibition is intended to keep law firms either on one side or the other of all criminal matters, so as to avoid any possible conflict of interest. Your situation, if it is correctly stated above, is distinguished by the fact that in any and every case, you and your partner will always appear on the side of the defense in any criminal case. The admonition cited in our earlier opinion would seem to be out of context if applied to your particular situation, absent the "conflict of interest" to which the cited admonition relates.

The above conclusion obviously deviates from the general rule that a firm member may not accept employment which any other member of the firm is precluded from taking, but we think there are other considerations in addition to the distinction made above. Section 19-801, Idaho Code, gives every defendant the right to aid of counsel. A free choice of counsel, though not specifically provided in the statute, would seem inherent in the law and certainly any criminal defendant should be permitted to choose

his counsel as freely as is possible from among all attorneys who are otherwise available. In addition, we find in § 19-866, Idaho Code, that "The protections provided by this Act (Public Defender Act) do not exclude any protection or sanction that the law otherwise provides." This statement in the law suggests at least that the legislature, in adopting the Public Defender Act, did not intend to deny solvent criminal defendants access to attorneys whose associates or partners might be public defenders.

Section 19-860, Idaho Code, and the Public Defender Act in its entirety, clearly relate only to indigent defendants in criminal cases. It must follow then, that persons who, by their own means, can pay to engage defense counsel, do not fall within the intended application of the Act.

Please understand that what has been said above is not intended in any way to contradict the provisions of § 19-860, Idaho Code, which precludes the public defender himself from engaging in the practice of criminal law other than that in the discharge of the duties of his office. We submit that the wisdom of the restriction thus stated in the statute is to avoid abuses, misunderstanding and confusion that might otherwise occur if the same person were to represent, at public expense, those who are or claim to be needy and at the same time represent those who are not. Though we must reserve the right to modify or change our opinion if there are qualifications or circumstances not herein considered, we do not find any likelihood of abuse, confusion, or misunderstanding if you continue to represent your own clients, so long as your practice is strictly separated from that of your partner in criminal matters and unless or until a conflict of interest appears.

DATED this 3rd day of November, 1971.

---

\*This Opinion is basically the same as I.S.B. Opinion No. 84 (December 30, 1974).