

FORMAL OPINION NO. 80 *

The opinion requested is for guidance to those attorneys who have been appointed to investigate or prosecute disciplinary matters. The question is:

What should such attorney do if he finds that the attorney under investigation or prosecution is his adversary in a pending civil matter?

The profession has a duty to see that those admitted to the Bar are properly qualified by character, ability and training and, moreover, to see that those who thereafter prove unworthy of the privileges are deprived of them. By special assignment, this last mentioned duty can become the specific obligation of an attorney in a particular matter and which he should not seek to avoid. Though not strictly in a lawyer-client relationship with the Bar, such attorney should refuse employment when his interests "may impair his independent professional judgment" or result in the appearance of impropriety." DR 5-101, Code of Professional Responsibility.

We believe the attorney's first duty is to his own client, whether that duty arose before or after the investigation or prosecution was initiated. If before, he should immediately report his circumstances and seek to be reasonably excused. If the situation arises after a prosecution has begun, it would seem proper then for such attorney to consider the extent of his involvement in the prosecution and the hardship and difficulty it would cause if he withdraws as against the magnitude of the civil matter requiring his services and perhaps his prior relationship with the client. It would seem proper that such attorney withdraw from one assignment or the other. Each case must be weighed in the light of the facts and circumstances and if such attorney feels that it is necessary to withdraw from a disciplinary matter once commenced, he should seek the approbation of the Bar Commissioners or other appointing authority. We believe the role of the prosecuting or investigating

attorney would possibly appear to give him an advantage over his adversary in the civil matter and whether justified or not such appearance, in fairness to both attorneys, should be avoided.

The question follows as to whether the rule prohibiting an attorney's partners or associates from engagements he cannot accept would apply in such cases. The Committee is of the opinion that such limitation would indeed be applicable.

DATED this 7th day of October, 1974.

*Controlling Code provisions are DR 5-105 and Canon 9.