

BAR ASSOCIATION OF ERIE COUNTY  
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 05-04 – 3/7/05

Topic: Continued representation of client after attorney becomes complainant in criminal action against client.

Digest: Conflict of Interest & Lawyers as Witnesses lawyer must withdraw as appellate counsel.

Code: DR 5-101 A. [§1200.20] & DR 5-102 B. [§1200.21]

**QUESTION**

May an attorney who represents a client before an appellate court, *pro bono*, and then becomes a complainant in a criminal action and obtains an order of protection against the client continue to represent the client in the appellate action?

**OPINION**

The attorney must withdraw from all representation of the client. The fact that the attorney is representing the client *pro bono* is of no moment.

Disciplinary Rules DR 5-101 (A.) [1200.20], Conflict of Interest, DR 5-102 (B) [1200.21] Lawyers as Witnesses:

DR 5-101 (A.) A lawyer shall not...continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own..., ..., ..., personal interests, unless a disinterested lawyer would believe that the representation of the client will not adversely be affected thereby and the client consents to the representation after full disclosure. The cases are legion that the defendant cannot waive the conflict in a criminal action. Therefore, that the disinterest lawyer test is inapplicable.

The applicable portion of DR 5-102 (B.) proscribes, ... a lawyer...shall not accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer.... may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.

Here, the lawyer may be called as a witness on behalf of the People of the State of New York against the client's penal interest. Also, with an order of protection in place, the lawyer may be placed again as being the complaining witness in a criminal contempt proceeding against the client's penal interest.

**Conclusion**

For the reason stated above, the attorney must withdraw from representing the client in all present and future matters.