Ethics Opinion No. 86-5

Withdrawal of an Attorney when the Attorney is a Potential Witness in the Case He is Handling.

The Alaska Public Defender Agency (the "Agency") has requested that the Committee clarify under what circumstances it is necessary for an attorney employed by the Agency to withdraw from the representation of a criminal defendant in circumstances where the Agency attorney will or may be called as a witness.

Statement of Facts

The Agency represents defendant in several cases in which defendant is charged with various unrelated felonies and misdemeanors. Defendant failed to appear for hearings in several of these cases and as a result was charged with both felony and misdemeanor violations of AS 12.30.060 (sometimes referred to herein as the "violations of conditions" cases). The Agency has been appointed to represent defendant in defending the AS 12.30.060 misdemeanor charges. It is anticipated that the Agency will be appointed to represent the defendant in defending the felony charges.

The Agency attorney assigned to represent defendant was informed by the District Attorney's Office that the Agency attorney will not be called to testify at the Grand Jury proceedings, but may be called as a witness at defendant's trial.

The Agency attorney assigned to defendant's underlying cases is a potential witness at trial with regard to the events which transpired during the various hearings at which defendant failed to appear and the Agency attorney attended. The arguments which defendant will raise in defense of the violations of conditions charges may relate to the notice defendant had of the various hearings defendant failed to attend and the contacts the Agency had with the District Attorney's Office with regard to these hearings.

The Agency has asked the Committee to determine:

- 1. Whether the Agency is required to withdraw from representing defendant in the violations of conditions cases at which Agency attorneys are likely to be called as witnesses;
- 2. Whether the Agency is required to withdraw from the underlying criminal cases out of which the violation of conditions charges arose;

- 3. Whether the Agency is required to withdraw from representing defendant in a separate criminal case in which there are presently no violation of conditions charges, but in which such charges are potential and the Agency's attorneys are potential witnesses with regard to these charges;
- 4. Whether the Agency is required to withdraw from an appeal on which the briefing and argument are concluded and the court's opinion is pending.

Conclusions

- 1. The Agency is required to withdraw from representation of defendant in cases in which Agency attorneys will or are likely to be called as witnesses;
- 2. The Agency is not required to withdraw from the underlying criminal cases out of which the violation of conditions charges arose;
- 3. The Agency is not required to withdraw from other case in which there are no pending violation of conditions charges;
- 4. The Agency is not required to withdraw from an appeal on which briefing and argument are concluded.

Discussion

1. Whether the Agency is Required to Withdraw from Representing Defendant in the Violation of Conditions Cases at Which Its Attorneys May be Called as Witnesses.

The Agency has indicated to the Committee that the defenses which defendant will most likely raise with regard to the violation of conditions charges will relate to the notice defendant was given as to future dates and times of hearings. Such notice would have been given at the hearings attended by the Agency attorney but not by defendant, or received by the Agency attorney through contacts with the District Attorney's Office. The Agency attorney may be a witness on behalf of defendant in support of his lack of notice defenses or on behalf of the prosecution in support of its position.

Canon 5 of the Code of Professional Responsibility provides that a "lawyer should exercise independent professional judgment on behalf of a client." In order to safeguard this independent professional judgment, the lawyer is required to withdraw from the representation of a client under certain circumstances when he is a potential witness in the client's case or when his testimony may be adverse to his client.

DR 5-102(A) provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

A lawyer's ability to exercise independent judgment is obviously placed in a compromising position if the lawyer's duty as an advocate becomes intermingled with his role as a witness in the same proceeding. *Williams v. District Court*, 700 P.2d 549, 553 (Colo. 1985). The duty of a lawyer as an advocate is to represent his client zealously within the bounds of the law. Cannon 7, Model Code of Professional Responsibility. The responsibility of a witness, on the other hand, is to testify objectively to facts within the witness' knowledge. A lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both roles. *See Williams*, 700 P.2d at 5532; *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 624 P.2d 296, 299-300 (Ariz. 1981). Any attack upon the lawyer's credibility as witness will necessarily have a detrimental impact upon the lawyer's credibility as advocate. *See also* ABA Informal Opinion 1446 (February 3, 1980); Alaska Bar Ethics Opinion No. 85-3 (August 23, 1985).

DR 5-102(B) provides:

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 5-102(B) addresses the situation where a lawyer may be called to testify on behalf of the opposing party. For the withdrawal requirement of DR 5-102(B) to apply, it is only necessary that a lawyer "may" be called to testify for the opposing party. Therefore, because the District Attorney's Office has indicated that it will potentially call the Agency attorney assigned to defendant's case to testify at trial, the requirements of DR 5-102(B) are applicable.

The withdrawal requirement of DR 5-102(B), however, only applies if a lawyer's testimony is or may be prejudicial to his client. It is sufficient that the attorney's testimony be only potentially prejudicial for withdrawal to be required. Because the Agency attorney's testimony will relate to matters which are directly relevant to any defenses that defendant may raise against the AS 12.30.060 charges, the attorney's testimony is potentially prejudicial to defendant. Accordingly, the Agency attorney is required to withdraw from representation of defendant in the violation of conditions cases at which he is likely to called as a witness.

It is clear from the provisions of DR 5-102(A) that a lawyer should withdraw from representation when he ought to be called as a witness for his client concerning a disputed question of fact relating to the merits of the cause, if such withdrawal would not work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case. *National Filtronics, Inc. v. Sherwood Land*, 428 So.2d 11, 14 (Ala. 1983). The decisive question is not whether the lawyer will be called as a witness, but whether he *ought* to be called. *People ex. rel. Younger v. Superior Court of San Bernadino County*, 86 Cal. App.3d 180, 150 Cal. Rptr. 156 (1978). It is also clear from the provisions of DR 5-102(B) that a lawyer should withdraw when the testimony will be adverse to the client.

2. Whether the Agency is Required to Withdraw from the Underlying Criminal Cases Out of Which the Violation of Conditions Charges Arose.

There is no indication that the Agency attorney assigned to represent defendant will be called to testify in the underlying criminal cases out of which the AS 12.30.060 charges against defendant arose. Accordingly, the Agency attorney assigned to defendant's case is not required to withdraw from representing defendant in defending the underlying criminal cases out of which the violation of conditions charges against defendant arose.

3. Whether the Agency is Required to Withdraw from Representing Defendant in a Separate Criminal Case in Which There are Presently No Violation of Conditions Charges But in Which Such Charges are Potential and the Agency's Attorneys are Potential Witnesses with Regard to These Charges.

For the same reasons stated in response to the Agency's second question, the Agency is not required to withdraw from representation of the defendant in a separate criminal trial. At present there are no violations of conditions charges. There is therefore insufficient likelihood that the Agency attorney assigned to represent defendant will be called to testify. Moreover, the Agency has presented no facts to the Committee which suggest that the Agency attorney assigned to defendant's case will be called to testify in the criminal case at issue.

4. Whether the Agency is Required to Withdraw from an Appeal on Which the Briefing and Argument are Concluded and the Court's Opinion is Pending.

Regardless of whether the appeal at issue involved the defense of defendant with regard to AS 12.30.060 charges or the underlying criminal case out of which the AS 12.30.060 charges arose, no withdrawal is required. Withdrawal of the Agency attorney assigned to defendant's case would be required if the Agency attorney was a potential witness in defendant's defense. At this late stage in defendant's case, where the court's opinion is awaited on

appeal, there is no likelihood that the Agency attorney will be called to testify. Moreover, at this stage, even if withdrawal were relevant because of potential testimony, the withdrawal would arguably cause substantial hardship upon defendant. Accordingly, withdrawal is not required.

Adopted by the Alaska Bar Association Ethics Committee this 4th day of November, 1986.

Approved by the Board of Governors on November 7, 1986.