

New York's Indelible Right to Counsel Rules

New York's indelible right to counsel is based not on the fifth or sixth amendment of the federal constitution, but on New York State Constitution Article 1 Section 6. The Rule, as set forth in *People v. Arthur*¹ states that:

Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel...There is no requirement that the attorney or the defendant request the police to respect this right of the defendant.

In practical terms, what this means is that whatever a defendant's indelible right to counsel attaches, the defendant will never waive and speak to the police. The law says he cannot waive in the absence of counsel. Common sense says that in 99 out of 100 cases, it would be unwise for the attorney to permit him to waive in counsel's presence. Because this right is so protective of a defendant, it is important to track its progress from the early 1960's to date.

In the cases of *People v. Donovan*², *People v. Arthur*³ and *People v. Hobson*⁴, the Court of Appeals ruled that once the police have knowledge that there is an attorney in the case, they can not question a defendant in custody about that case in the absence of his attorney and can not seek a waiver from the defendant in the absence of his attorney.

In *People v. Rogers*⁵ the court extended the rule to prevent police from questioning such a defendant about the current case or any other case, even if the defendant did not have an attorney on the other case and even though no criminal action had been commenced on the other case. As the court stated: "once a defendant is represented by an attorney, the police may not elicit from him any statements, (i.e. about any case), except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel". (Parentheses supplied.)

In *People v. Cunningham*⁶ the court gave the foregoing protections to any defendant who **requested** an attorney in the present case, even though no attorney actually represented the defendant.

In *People v. Skinner*⁷ the court ruled that the indelible right to counsel protected a defendant as to his current case even if defendant is not in custody, so long as he has an attorney representing him on that case. Skinner, however, did not go so far as to prevent police from questioning a non custodial defendant about other cases, on which he did not then have an attorney⁸. In other words, if the police know a non custodial defendant is represented by an attorney on case A, they may not question him on case A but they may question him about case B, C or D. Defendant of course need not speak to them at all.

In *People v. Bing*⁹, the court held that the indelible right to counsel would not apply to a defendant who was arrested in case A from being questioned about case A

where the police knew he had an attorney on unrelated case B. In so ruling, the court overruled the controversial *People v. Bartolomeo*¹⁰, which had held to the contrary.

In *People v. Samuels*¹¹, the court held that the indelible right to counsel attaches to a defendant as to a given case, whenever the police commence formal proceedings on a case by filing an accusatory instrument. This is so, even though there is no attorney present on the case and even though the defendant did not request an attorney. Such protection does not extend to other cases on which the police have not filed an accusatory instrument¹². The Samuels protection is significant because in New York State, whenever the police obtain an arrest warrant, they must first file an accusatory instrument¹³. Thus, whenever an arrest warrant is issued on a case, the police may not question the defendant unless and until an attorney appears and the defendant agrees in the attorney's presence to speak to the police.

¹ 22NY2d325 (1968)

² 13NY2d148 (1963)

³ See fn 1, supra.

⁴ 39 NY 2d 479 (1976)

⁵ 48 NY 2d 167 (1979)

⁶ 49NY2d 203 (1980)

⁷ 52 NY 2d 24 (1980)

⁸ See *People v. Hauswirth* 60 NY 2d 904 (1983)

⁹ 76 NY 2d 331 (1990)

¹⁰ 53 NY 2d 225 (1981)

¹¹ 49 NY 2d 218 (1980)

¹² *People v. Kazmarik* 52 NY 2d 322 (1981)

People v. Ruff 81 NY 2d 330 (1993)

¹³ CPL C 120.20 (1)