

## NEW YORK STATE BAR ASSOCIATION

### Committee on Professional Ethics

Opinion 642 - 2/12/93 (45-92)

Topic: Lawyer as witness; arbitration.

Digest: Lawyer-as-witness rule applies in the context of an arbitration.

Code: Definition 6, DR 5-101(B), DR 5-102(A), EC 5-10.

#### QUESTION

Does the "lawyer-as-witness" rule prevent an attorney from serving as both attorney for a union and as a witness in an arbitration concerning a collective bargaining agreement the attorney negotiated?

#### FACTS

The inquirer has represented a labor union in collective bargaining negotiations, and is currently representing the union in a grievance arbitration in which the parties disagree as to the proper interpretation of a provision of the agreement he negotiated. The employer has indicated an intention to call its own negotiator (an attorney and former employee) as a witness at the arbitration. Depending upon this witness's testimony, the inquirer believes that he may have to testify as a rebuttal witness.

#### OPINION

Pursuant to DR 5-102(A) of the Code of Professional Responsibility, a lawyer must withdraw as an advocate before a tribunal if the lawyer learns, or it is obvious, that the lawyer ought to be called as a witness in the proceedings on behalf of the client. The Code defines "tribunal" as referring not only to courts, but to "all other adjudicatory bodies." Definition 6. It is the opinion of this Committee that a single arbitrator, or a panel of arbitrators, constitutes an "adjudicatory body" within the meaning of the Code. Indeed, courts frequently refer to "arbitral tribunals." *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Steele v. L.F. Rothschild & Co.*, 864 F.2d 1, 2 (2d Cir. 1988); *Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985); *Matter of Granite Worsted Mills, Inc. (Aaronson Cowen, Ltd.)*, 25 N.Y.2d 451, 457 (1969); *Matter of Lipschutz (Gutwirth)*, 304 N.Y. 58, 61 (1952). It follows, then, that DR 5-102(A) applies in the context of an arbitration. *See Ridermann Industries Licensing, Inc. v. Avmar N.V.*, 173 A.D.2d 401, 402, (1st Dep't 1991)(affirming stay of arbitration pending judicial resolution of disqualification

issue); Virginia Op. 655 (1985)(DR 5-102 applies in arbitration proceedings); *contra Dunmore Police Assn. v. Borough of Dunmore*, 528 A.2d 299, 301 (Pa. Comm. 1987)(DR 5-102 does not apply in "informal" labor arbitration). Thus, a lawyer-witness may continue in an advocacy role only if one of the four enumerated exceptions in DR 5-101(B) applies.

The lawyer must determine whether to withdraw from serving as an advocate before the arbitrator based on the lawyer's knowledge and understanding of all the facts and circumstances. In so doing, the lawyer must carefully and continually assess whether DR 5-102(A) has been triggered, that is, whether the lawyer ought to be called as a witness in the proceeding. Once that point has been reached, the lawyer must determine whether any of the exceptions in DR 5-101(B) applies. In this regard, we note that the exception set forth in DR 5-101(B)(4), that predicated on the substantial hardship that would befall the client because of the distinctive value of the lawyer as counsel in the particular case, applies only in the most exceptional situations, *see* EC 5-10. In assessing the applicability of that exception, the lawyer should be guided by the principles set forth in EC 5-10.

### **CONCLUSION**

For the foregoing reasons, the question is answered in the affirmative.

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