

New York State Bar Association

Committee on Professional Ethics

Opinion 743 – 5/25/01

Topic: Labor union; lawyer for organization.

Digest: Union attorney who represents union member in an arbitration proceeding must keep union member's confidences. Union attorney who represents union in grievance proceeding under collective bargaining agreement must make clear to union member who is the subject of the proceeding that union member is not the client and that union member's disclosures will not be kept in confidence; having done so, attorney may share disclosures with union and, at union's direction, may distribute arbitrator's decision.

Code: DR 4-101(A), (B) and (C)(1); 5-107(B); 5-108(A)(2);5-109(A)

QUESTION

Many unions employ attorneys to conduct arbitration proceedings for the benefit of union members who were disciplined by their employers. Depending on the context, the party to the proceeding may be the union or the union member.

In some contexts, the employee and the employer are the parties to the proceeding. This is true, for example, where the arbitration concerns disciplinary charges against a public sector employee under Civil Service Law §75. In that event, the union furnishes and pays the attorney for the employee, but the employee is the client.

In other contexts, although the subject of the arbitration is disciplinary charges against a union member, the union and the employer are the parties to the proceeding. This may be true of proceedings involving either public or private sector employees where a collective bargaining agreement ("CBA") between the union and the employer so provides. In that event, the union has a duty of fair representation but is nevertheless the party to the arbitration. Although the union's lawyer is seeking to protect the union member's interests under the CBA, the lawyer is nevertheless a lawyer for the union, and not necessarily the union member. Ordinarily, to represent the union effectively,

however, the union's attorney must communicate with the union member and learn information from the union member concerning the subject of the proceeding.

After hearing testimony and receiving other evidence at the arbitration, the arbitrator transmits his or her decision to the attorney for each party. Depending on the forum, the arbitrator's decision may also be transmitted to the Public Employment Relations Board, the American Arbitration Association, the Federal Mediation and Conciliation Service or some similar agency. Traditionally, arbitration awards become part of the history of the CBA and may have precedential value both to the union and to the employer.

After the arbitrator issues a decision, may the attorney distribute copies of the decision to other union members if requested to do so by the union?

OPINION

Under DR 4-101, the union attorney has a duty to protect the "confidences" and "secrets" of the attorney's client. The terms "confidence" and "secret" are defined in DR 4-101(A) as follows:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

The arbitrator's decision is unlikely to contain client confidences, since the attorney-client privilege will not apply to testimony and evidence introduced at the arbitration. However, the decision is likely to include "secrets" of the client. As discussed below, the critical question in this context is, who *is* the client of the union attorney?

Duty of confidentiality where the employee is the party

When the employee is the party to the arbitration, the union's attorney represents the employee and, thus, owes the employee a duty of confidentiality under DR 4-101. This is true notwithstanding that the union supplies and pays the attorney for the employee; indeed, DR 5-107(B) specifically provides that when a third party pays the lawyer's fee, the lawyer may not allow that third party to compromise the lawyer's duty to maintain the confidences and secrets of the client. This is comparable to the situation discussed in our earlier opinions where an attorney is retained by an insurance carrier to represent a policyholder. In that situation, the policyholder is the client, and the lawyer must preserve the policyholder's confidences and secrets. *See, e.g., Feliberty v. Damon*, 72 N.Y.2d 112, 120, 531 N.Y.S. 2d 778, 782 (1988); N.Y. State 716 (1999); N.Y. State 721 (1999); N.Y. State 73 (1968); DR 5-107(B).

Because the employee is the client in this context, the lawyer may not disclose the employee's "confidences" and "secrets" without the employee's consent. Although the lawyer has disclosed the employee's "secret" in the arbitration proceeding, that information continues to be a "secret" under DR 4-101 "if the client has requested [it] be

held inviolate or the disclosure of [the information] would be embarrassing or would be likely to be detrimental to the client," unless the information has become generally known. Therefore, the lawyer may not disclose the information outside the arbitration hearing without the client's consent. *Cf.* N.Y. State 721 (1999). Accordingly, whether or not the arbitration decision is a publicly available document, if it contains the union member's secrets, the attorney may not provide it in full to the union or circulate it in full to other union members or to the union without the union member's consent. DR 4-101(B); DR 5-108(A)(2); N.Y. State 721 (1999). If it is possible to redact the decision so that the employee is not directly identified and cannot conceivably be identified indirectly from the unredacted portions of the decision, however, it may be possible to distribute a copy that is so redacted. *See* N.Y. State 718 (1999).

Duties where the union is the party

In some situations, the CBA between the union and the employer provides the union with control of a "grievance"—that is, an allegation that a CBA has been improperly interpreted or applied, such as the failure to comply with provisions regarding the treatment of an individual or group of individuals, as in the case of discipline or discharge. The union (and not the individual union member) is the formal party initiating, pursuing and resolving the grievance. *See* Archibald Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 627-30 (1956). In this context, the union is the attorney's client. Union attorneys who interact with bargaining unit members do not always make clear, however, that they represent the union exclusively. *See generally* Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. Tex. L. Rev. 1095, 1112-14 (1996).

When the union's lawyer fails to make it unambiguously clear to the employee that the employee is not a client, the employee may disclose information to the lawyer under the mistaken belief that the lawyer represents the employee as well as the union and the mistaken belief that the lawyer will keep any confidences and secrets. If the lawyer fails to dispel that understanding and interacts with the employee in a manner that makes the understanding reasonable, the lawyer may inadvertently create a lawyer-client relationship with the employee at least for purposes of DR 4-101 if not for all purposes. *See generally* Restatement (Third) of the Law Governing Lawyers §14, Comment e. Therefore, at the outset of their discussions, the lawyer must fully explain to the employee the relationship between the lawyer, the employee and the union, including that information imparted by the employee may be disclosed by the attorney to the union and shared by the union with its other members. *Cf.* DR 5-109(A). Among other things, the lawyer should advise the union member of the union's practice (if it exists) of distributing the arbitrator's decision to other union members.

Whether, having done that, the lawyer still owes "derivative duties" to the employee is a matter of law that we cannot answer as it is beyond our jurisdiction. We are unaware of any contractual or legal duty that the union owes to its member to preserve the confidentiality of information imparted by the member to the union's attorney, and the inquirer has not advised us that such a duty exists. However, if the CBA or some other agreement or provision of law requires the union to preserve the

employee's confidences and secrets, then the lawyer would ordinarily have a duty to do so as well, as an agent of the union. *Cf. Pearce, supra*, at 1115-17.

Assuming that the union itself has no confidentiality obligation to the employee, then the lawyer has none either, so long as the lawyer has made it clear to the employee that the lawyer does not represent the employee and that whatever is told to the lawyer may be shared with the union. In that event, the union may determine whether to direct the lawyer to distribute the decision of the arbitrator and the lawyer may comply. As a matter of good practice, however, the lawyer should consider advising the union of the possibility of distributing a redacted version that avoids identifying the employee directly by name or indirectly by the facts.

CONCLUSION

For the reasons stated above, when an in-house or staff attorney is employed by the law department of a labor union to represent a union member in an arbitration in which the member is a party, the attorney owes the member a duty of confidentiality and therefore may not disseminate copies of an arbitration decision that contains the member's secrets. When the attorney represents the union as a party pursuant to a collective bargaining agreement, the attorney must make clear to the union member that the attorney represents only the union and that information imparted by the member may be shared with the union and disseminated more broadly at the union's direction; having done so, the attorney may distribute copies of the arbitration decision if directed to do so by the union.

(8-01)
