STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 9, Complainant, vs. PORT OF SEATTLE, Respondent.	CASE 17932-U-03-4624 DECISION 8600 - PECB RULING ON MOTION TO STRIKE TESTIMONY

Schwerin, Campbell Barnard, by *Dmitri Iglitzin*, Attorney at Law, for the union.

Craig Watson, Attorney at Law, for the employer.

On October 20, 2003, International Longshore and Warehouse Union, Local 9 (union) filed an unfair labor practice complaint against the Port of Seattle (employer). Examiner Karyl Elinski conducted a hearing on February 13, 2004. The question now before the Examiner is limited to a motion filed by the employer on February 27, 2004.

During the hearing, the union's attorney called himself as a witness, and gave rebuttal testimony concerning his participation in the previous negotiations for the parties' collective bargaining agreement. The employer objected at that time. Iglitzen's testimony was received subject to the employer's objection, but the employer was invited to file a formal motion at a later date if it desired to do so. The employer thus filed the motion that is now before the Examiner. The union filed a written response to that motion on March 8, 2004. The Examiner affirmed her initial ruling

during a telephone conference call with counsel for both parties on April 12, 2004. This order is issued to confirm the denial of the employer's motion.

POSITIONS OF THE PARTIES

The employer argued that allowing the testimony of Dmitri Iglitzin would be in clear violation of the Washington Rules of Professional Conduct (RPC), specifically, Rule 3.7. It asserted that Iglitzin knew or should have known that he might become a witness in this matter. In addition, the employer argued that Iglitzin failed to testify that the union's business agent had no clear recollection of the critical negotiation session. Instead, prior to taking oath, Iglizin merely stated to the hearing examiner that the business agent had no clear recollection.

The union argued that Iglitzin's testimony was admissible as "relevant testimony" under Washington Evidence Rule 402. The union claimed RPC 3.7 pertains to an attorney's continued representation of a party after it is clear the attorney is a witness in the matter, and not to the admissibility of the attorney's testimony. The union also asserted that the employer failed to raise the issue of whether Iglitzin's continued representation violated RPC 3.7.

ANALYSIS

The Rules of Professional Conduct

RPC 3.7 discourages attorneys from advocating at trial in a matter in which the attorney may be a necessary witness, stating:

> RPC 3.7 LAWYER AS WITNESS. A lawyer shall not act as advocate at a trial in which the lawyer or another lawyer in the same firm is likely to be a necessary witness except where:
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> (a) The testimony relates to an issue that is either uncontested or a formality;
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> (b) The testimony relates to the nature and value of legal services rendered in the case;
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> (c) The lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate; or
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> (d) The trial judge finds that disqualification of the lawyer would work a substantial hardship on the client and that the likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial.

Notably, RPC 3.7 does not address the admissibility of the attorney's testimony.

The relative dearth of Washington case law addressing RPC 3.7 focuses on the disqualification of an attorney witness. In *PUD v. International Insurance Company*, 124 Wn.2d 789 (1994), the plaintiffs' attorney was involved in drafting a settlement agreement in separate, but related, litigation. The defense sought to disqualify the plaintiffs' attorney so that the defense could call the attorney as a witness. Although the evidence was available from other sources, the trial court refused to grant the motion to disqualify and allowed the defense to call the attorney as the witness. The Supreme Court ruled that the trial court properly balanced the parties' interests when it denied the defendant's motion to disqualify the plaintiff's attorney under RPC 3.7, and further reasoned that the plaintiffs would be prejudiced if their attorney were disqualified. In *State v. Bland*, 90 Wn. App. 677 (1998), *review denied*, 135 Wn.2d 1028 (1998), the Court of Appeals determined that a trial court should consider the following when ruling on a motion to disqualify a witness pursuant to RPC

3.7: Whether an attorney/witness can be objective, whether the role of the attorney/witness would artificially bolster the witness's credibility or make it difficult for the jury to weigh testimony, and whether the dual role raises an appearance of unfairness. Thus, the courts have generally confined their consideration of potential RPC 3.7 violations to the question of disqualification of attorneys who hold the status of witness.

In *In re Vetter*, 104 Wn.2d 779, 794 (1985), the Supreme Court of the State of Washington ruled that an attorney who was the subject of disciplinary proceedings was not prejudiced by the testimony of the attorney who investigated the matter and represented the Bar Association in the administrative disciplinary proceedings. The Supreme Court found that "minimal danger exists that the testimony of bar counsel will be given undue weight based on his official position, since the hearing examiners are capable of properly weighing the testimony of bar counsel. . . ." 104 Wn.2d 779 at 783.

The Washington State Bar Association has not issued a formal opinion regarding whether the term "trial" as used in RPC 3.7 applies to administrative proceedings. Washington law permits laypersons to represent parties in proceedings before the Public Employment Relations Commission. WAC 391-08-10.

Courts in other states which have adopted rules identical to RPC 3.7 permit attorneys to testify in administrative proceedings, but strongly discourage such practice. In *Heard v. Foxshire Assoc.*, 145 Md.App. 695 (2002), a hearings examiner primarily relied on the narrative testimony of the applicant's attorney in granting a special use permit, and the appellate court denied an appeal premised on the failure to satisfy a "substantial evidence test," holding that "there exists a distinction between a 'trial' and a

'hearing' in the application of the Rules of Professional Conduct." That court further concluded that the rules of professional conduct "do not preclude the giving of evidence by an attorney of record for a party before an administrative agency."[1]

Noting the creation of the Public Employment Relations Commission by Chapter 41.58 RCW and its charter to enforce certain state collective bargaining statutes, the limited Commission precedent on this subject area has rejected arguments similar to those advanced by the employer in this case:

> The Commission conducts adjudicative proceedings under the state Administrative Procedure Act, [citation omitted], and generally uses the Model Rules of Procedure adopted by the Chief Administrative Law Judge. [citation omitted]. None of those statues or rules empower the Commission to enforce the rules of Professional Conduct . . . .

Tacoma Housing Authority, Decision 7390-A(PECB, 2002). In that case, the Commission declined to grant a motion to disqualify an attorney whose partner testified as a witness in that hearing.

Washington cases interpreting RPC 3.7 fail to address the admissibility of attorney testimony, especially in administrative proceedings. In light of explicit precedent addressing the admissibility of the testimony in question, the Examiner rules that the testimony of Iglitzin is permissible.

The Public Employment Relations Commission strongly discourages attorneys from testifying on behalf of their clients in its

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[1] The Maryland court ruled that it is nevertheless imperative that the testimony by given under oath.

proceedings, however, even if finding other representation would result in a delay in proceedings.

The APA Standard for Admissible Evidence

The employer's objection concerning Iglitzen's reference to the union's business agent requires application of the admissibility standard set forth in the state Administrative Procedure Act, Chapter 34.05 RCW (APA) at RCW 34.05.452, as follows:

> (1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonable prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

The employer's objection goes to the weight to be accorded to the testimony, rather than to its admissibility.

NOW, THEREFORE, it is

ORDERED

The employer's motion to strike the testimony of Dmitri Iglitzin is hereby DENIED.

Issued at Olympia, Washington on the 18th day of June, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Karyl Elinski

KARYL ELINSKI, Examiner