STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KITSAP COUNTY DEPUTY SHERIFFS' GUILD,	)	
Complainant,	)	CASE 19286-U-05-4897
vs.	)	
	)	DECISION 9326 - PECB
KITSAP COUNTY,	)	
	)	RULINGS ON MOTIONS
Respondent.	)	

George Merker, Attorney at Law, for the union.

Summit Law Group, by *Bruce Schroeder*, Attorney at Law, for the employer.

On March 15, 2005, the Kitsap County Deputy Sheriffs' Guild (union) filed an unfair labor practice complaint against Kitsap County (employer). The complaint alleges employer interference with employee rights, discrimination, and refusal to bargain, by reprimand of the union president in reprisal for union activities, unilateral change in payment practices for requested records, and breach of good faith bargaining obligations. Examiner Lisa A. Hartrich held a pre-hearing conference to discuss procedural matters with the parties on March 6, 2006.[1] During that conference, the union's attorney indicated that he intended to subpoena the employer's attorney as a witness in this case. The employer objected. In the weeks that followed, the parties filed numerous motions, responses, declarations and replies on various issues, including a union motion asking the Examiner to withhold permission

[1] The pre-hearing conference was held by telephone conference call. Hearing dates had previously been scheduled a number of times, but were postponed by agreement of the parties.

for the employer's attorney to act as the employer's counsel in the hearing on this case (because he was subpoenaed as a witness for the same hearing), a union motion to compel production of documents that the employer claimed were protected by attorney-client privilege, an employer motion to disqualify the union's attorney (based on his association with other attorneys who will be witnesses), and an employer motion to quash the subpoena issued by the union to the employer's attorney.

ISSUES PRESENTED

This decision is limited to the four motions filed prior to the hearing date, and does not address the original unfair labor practice allegations.

Issue 1: May the employer's attorney serve as counsel for the employer at a hearing where he may testify as a witness?

Issue 2: Should an attorney who is "of counsel" to a firm be disqualified from representing a client in a hearing where other members of the firm may be witnesses?

Issue 3: Should the subpoena served on the employer's attorney be quashed?

Issue 4: Can the employer be compelled to produce certain documents related to this unfair labor practice case?

The Examiner declines to exclude either of the parties' attorneys from the case, declines to quash the subpoena, and declines to order a discovery method that is not authorized by the Commission's rules.

ANALYSIS

Legal Principles For Issues 1 and 2: Attorney Ethics

The Washington Rules of Professional Conduct (RPC) are modeled after the Model Rules of Professional Conduct originally adopted by the American Bar Association (ABA) in 1983. Rule 3.7 of the ABA rules prevents an attorney from representing a client at a hearing where the attorney will also be called as a witness. Most state bar authorities have adopted Rule 3.7, or some minor variation of it.[2] There are multiple reasons for limiting the ability of attorneys to testify at trials where they are also advocates, the clearest being that it can create a conflict of interest between the lawyer and the client. There is also the question of whether an attorney-witness can be objective, or whether testimony would create an appearance of unfairness or impropriety.

As promulgated by the Washington State Bar Association (WSBA), RPC 3.7 states:

> RULE 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 law firm is likely to be a necessary witness except where:
>
> (a) The testimony relates to an issue that is either uncontested or a formality;
>
> (b) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (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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[2] The WSBA has proposed restructuring Rule 3.7 to conform with the format and content of the ABA's Rule 3.7. The Washington State Supreme Court approved the proposed change for public comment in the January 2005 Advance Sheets of the Washington Reports (153 Wn.2d No. 1). However, the new rule has not yet been adopted.

> (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.

Washington's Rule 3.7(c) is unique, in that it anticipates a situation where the rule might be used inappropriately as a tactic to disqualify the opposing lawyer.[3] RPC 3.7 also prohibits any lawyer from acting as an advocate in a trial in which the lawyer, or another lawyer from the same firm, is likely to be a necessary witness.

While the subject of attorney-witness has received relatively light treatment by the Commission, it is clear that the Commission has chosen to follow National Labor Relations Board (NLRB) precedent.[4] In *Wells Fargo Armored Service Corp.*, 290 NLRB 872 (1988), the Board disagreed with the administrative law judge's ruling that an attorney was precluded ethically from appearing as a witness. The Board explained:

> [I]t is not the Board's function or responsibility to pass on the ethical propriety of a decision by counsel to testify in an NLRB hearing. Where the testimony is otherwise proper and competent, it should be admitted into evidence.

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[3] This language is not included in the Model Rules.

[4] The Supreme Court of the State of Washington has held that decisions construing the National Labor Relations Act (NLRA), while not controlling, are generally persuasive in interpreting state labor laws that are similar to or based upon the NLRA. *Nucleonics Alliance v. WPPSS*, 101 Wn.2d 24 (1981). Chapter 41.56 RCW, is substantially similar to the NLRA. Thus, the Commission may look to NLRB decisions, when ruling on disputes between most employers and employees under its jurisdiction.

Wells Fargo Corp., 290 NLRB 872, 873, fn.3. See also *Page Litho, Inc.* 311 NLRB No. 87, fn.1 (1993).

In *Tacoma Housing Authority*, Decision 7390-A (PECB, 2002), Examiner Walter Stuteville denied a union motion to disqualify that employer's counsel, explaining that there were no statutes or rules that empowered the Commission to enforce RPC 3.7. *See also Port of Seattle*, Decision 8600 (PECB, 2004). If a lawyer conducts himself in a manner which the union or its counsel believe to be in violation of RPC 3.7, then the union or its legal counsel would need to take their complaint to the body responsible for administration of the RPC. *King County Fire District 16*, Decision 4116 (PECB, 1992).

Application of Standards for Issues 1 and 2

The undersigned Examiner is not empowered to enforce the RPC rules applicable to attorneys.[5] Therefore, the Examiner does not make any ruling in this case either enforcing or authorizing an exception to RPC 3.7. It follows that:

- As to Issue 1: The union has announced its intent to call Bruce Schroeder as a witness in this proceeding, where he is also counsel of record for the employer. The Examiner will not exclude the employer's attorney from acting as both an advocate and a witness in this hearing.

- As to Issue 2: The employer seeks to disqualify George Merker from representing the union, based on the fact that Merker is "of counsel" to the Cline and Associates law firm and that two attorneys from that firm have already removed themselves as

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[5] The Commission's rules do not even require that parties be represented by members of the WSBA in every proceeding before the Commission.

counsel for the union because their direct involvement in events leading up to the underlying complaint makes it likely that they will be called as witnesses. Merker contends that he has a separate and distinct firm, Merker Law Offices, and that there is no conflict of interest in representing the union in this matter,[6] but the Commission and NLRB precedents cited above make it unnecessary to reach or decide that question of fact. The Examiner will not exclude the union's attorney from acting in this case where one or more lawyers from the firm to which he is "of counsel" may be a witness.

For the reasons discussed above, the Examiner will not attempt to enforce the Rules of Professional Conduct.

ISSUE 3: THE MOTION TO QUASH THE SUBPOENA OF SCHROEDER

The employer seeks to have the Examiner quash the subpoena issued to its attorney under WAC 391-08-310, which includes:

> (7) The presiding officer, upon motion made at or before the time specified in the subpoena for compliance therewith, may:

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[6] There may be basis for the employer's claim, or at least to say that Merker's "of counsel" status is a bit blurry. Comment to Rule 1.10 of the ABA Model Rules defines "Firm" as including two or more practitioners who occasionally consult or assist each other *and* "present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm." Merker is listed as "of Counsel to Cline and Associates" on that firm's website, where his photograph and biography appear along with those of other attorneys and staff of the firm. Merker's name and e-mail address appear on "The Cline Newsletter" published by the firm. His e-mail address is gmerker@clinelawfirm.com, and his e-mail tag-line includes the name, address, telephone and fax numbers for the Cline and Associates firm.

> (a) quash the or modify the subpoena if it is unreasonable or oppressive;. . .

The employer argues that Schroeder should not be forced to testify, because it claims his only dealings with the employer in this matter are protected by attorney-client privilege. The union argues that the employer waived its attorney-client privilege when it decided to call its in-house counsel, Jackie Aufderheide, to testify in rebuttal of this case.

The Commission is not bound by technical rules of evidence prevailing in courts of law or equity. However, the Administrative Procedure Act directs administrative agencies to exclude evidence on the basis of evidentiary privileges recognized in the courts of this state:

> RCW 34.05.452 RULES OF EVIDENCE -- CROSS-EXAMINATION
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> (1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. *The presiding officer shall exclude evidence that is excludable on* constitutional or statutory grounds or *on the basis of evidentiary privilege* recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.
>
> (2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

(emphasis added). If the union actually calls Schroeder to testify in the hearing in this proceeding, and if the union asks Schroeder any questions about matters that he or the employer claims to be protected by the traditional attorney-client privilege, that will be the occasion for the employer to assert a specific objection.

The Examiner will rule at that time on the basis of the specific question asked and the specific objection made. The Examiner is mindful of the Commission's protection of the attorney-client privilege in *Port of Tacoma*, Decision 4626-A, 4627-A (PECB, 1995), and will be prepared to sustain appropriate objections at that time. The employer's motion to quash the subpoena issued to Schroeder asks the Examiner to speculate that there is no question the union could possibly ask that would not be protected by the attorney-client privilege, and is denied.

ISSUE 4: THE MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Pre-hearing discovery is not available in unfair labor practice hearings before the Commission. *Monroe School District*, Decision 5985 (PECB, 1997); WAC 391-08-300.

The facts concerning this issue are that the union requested information from the employer on October 6, 2005. The employer responded by producing some documents, but withheld seven e-mails which it claimed were protected by attorney-client privilege. On March 24, 2006, the union filed a motion to compel production of those documents, claiming that the employer waived the attorney-client privilege by calling Aufderheide as a witness.

The Examiner need not reach or decide the arguments concerning attorney-client privilege at this time. The Commission's rules do not support the union's demand to compel production of any documents. The motion is denied.

Conclusions

The Commission has generally discouraged motion practice, and each of the motions now before the Examiner is properly denied.

NOW, THEREFORE, it is

ORDERED

1. The Examiner declines to withhold permission for Bruce Schroeder to act as attorney in this case.

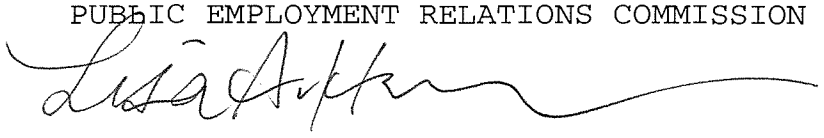
2. The Examiner declines to disqualify George Merker from acting as an attorney in this case.

3. The Examiner denies the motion to quash the subpoena issued to Bruce Schroeder, as premature and speculative.

4. The Examiner denies the motion to compel production of documents, as not authorized by the Commission's rules.

ISSUED at Olympia, Washington, this 17th day of May, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



LISA A. HARTRICH, Examiner