Ohio Board of Professional Conduct

OPINION 2021-03
Issued April 9, 2021

Lawyer -Shareholder Representing a Closely Held Corporation in a Private Arbitration

SYLLABUS: A lawyer may not serve as both an advocate for a client and a necessary witness in a private arbitration. A lawyer may represent a closely held corporation of which the lawyer is the sole shareholder and testify as a necessary witness in a private arbitration, subject to the discretion of the arbitrator.

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QUESTION PRESENTED:

Whether a lawyer may represent a closely held corporation, of which he or she is the sole shareholder, in a private binding arbitration when he or she will likely testify as a necessary witness.

APPLICABLE RULES: Prof.Cond.R. 3.4, 3.7, 4.2

OPINION: The requesting lawyer is the sole shareholder of an Ohio limited liability company with no employees. The limited liability company was formed for the sole purpose of a one-time purchase of real estate and has ceased all business activities. The limited liability company has been threatened with binding arbitration stemming from the real estate purchase. The lawyer wishes to represent the limited liability company during the impending arbitration and will likely testify as a necessary witness.

Prof.Cond.R. 3.7(a), commonly known as the "advocate-witness" rule, prohibits a lawyer from serving as "an advocate at a trial in which the lawyer is likely to be a necessary witness." A lawyer is a necessary witness after a trial court "determine[s] that

the proposed testimony is material and relevant to the issues being litigated and that the evidence is unobtainable elsewhere." *City of Akron v. Carter*, 190 Ohio App.3d 420, 2010-Ohio-5462 (9th Dist.) The "advocate-witness" rule applies whether the lawyer would be called as a witness by the lawyer's client or the client's adversary, and whether or not the lawyer's testimony would be favorable to the client. N.Y. St. Bar Op. 1045 (Jan. 8, 2015). Prof.Cond.R. 3.7 contains three enumerated exceptions, none of which is applicable to the analysis in this opinion.

On its face, Prof.Cond.R. 3.7(a) does not apply to a lawyer's representation of a client in an arbitration or administrative hearing as the rule references a prohibition against serving as an "advocate at a trial." In contrast to traditional litigation, proceedings before arbitrators are commonly referred to as hearings, not trials, are informal, and state court rules of evidence are not always observed. However, the comments to Prof. Cond. R. 3.7 suggest a broader application of the rule by using the term "tribunal." "Tribunal" is defined in Prof. Cond. R. 1.0(o) as "a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity." The comments reinforce that the purpose of the rule is to protect a tribunal from prejudice and confusion. Prof.Cond.R. 3.7(a), cmt.[1],[3]. The comment is not restricted to only matters involving litigation before a court. *See In re Disciplinary Proceeding Against Pfefer*, 182 Wash. 2d 716, 344 P.3d 1200 (2015) (holding advocate-witness rule applies to all tribunals, including disciplinary hearings, despite the language in the rule referencing the word "trial.")

The same ethical considerations for the advocate-witness in a trial apply equally in a binding arbitration before an arbitrator. The concern addressed by the advocate-witness rule is not so much where the conduct occurs, but rather the problem that is created when a lawyer advocates for a particular party before any forum and also testifies in that forum as to relevant and material facts. An arbitration proceeding, whether characterized as a hearing or trial, adjudicates the merits of the claims to the same extent that they are resolved before a judicial officer.[1] Similar issues that can arise with an advocate-witness at trial also can be present in the context of an arbitration. For example,

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[1] Binding arbitrations in Ohio are authorized and governed by state law and subject to the jurisdiction of courts of law. R.C. 2711.01 *et.seq.*

the dual roles of an advocate-witness may prejudice the opposing party's rights in an arbitration and it may not always be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. Prof.Cond.R. 3.7, cmt.[1].

The Board concludes that Prof.Cond.R. 3.7(a) applies to the conduct of a lawyer representing a client in a private arbitration. Michigan Adv. Op. RI-264 (1996). *See* N.Y. St. Bar 642 (1993) (lawyer may not serve as both lawyer for a union and as a witness in an arbitration concerning a collective bargaining agreement the lawyer negotiated.) Consequently, a lawyer has an ethical obligation under the Rules of Professional Conduct to not serve as both advocate and witness in an arbitration. However, the decision whether to permit a lawyer to represent a party in an arbitration when the lawyer will also serve as a necessary witness is within the sole discretion of the arbitrator.

Advocate -Witness Appearing Pro Se

While not an enumerated exception to Prof.Cond.R. 3.7(a), the strict application of the "advocate-witness" rule in the context of an arbitration is ameliorated when a lawyer is appearing *pro se* before a tribunal. Ohio courts have opined that the advocate-witness rule, as codified by rules of professional conduct, does not apply to a lawyer representing himself or herself in a court of law. *Krueger v. Willowood Care Ctr. of Brunswick, Inc*., 2019-Ohio-3976 (9th Dist.), *Horen v. Bd. of Edn.,* 174 Ohio App.3d 317, 2007-Ohio-6883 (6th Dist.) (trial court erred as matter of law by disqualifying lawyer from serving as her own counsel.)

The requesting lawyer is technically representing a separate legal entity in the arbitration. However, because he is the sole shareholder of a closely held corporation, he is essentially representing himself. The traditional concerns with "advocate-witness" representation of private clients or entities with multiple members, particularly issues raised by conflicts of interest between client and lawyer, do not exist under the facts presented. In addition, prejudice to the opposing party is less likely when the lawyer is the sole shareholder of the closely held corporation and the matter is being adjudicated in a binding arbitration. The Board concludes that the situation under the facts presented is more analogous to a lawyer appearing *pro se* before a tribunal and that the requesting lawyer may ethically proceed as both advocate and witness in a private arbitration, subject to his other ethical obligations. Pa. Eth. Op. 92-150. *See also National Child Care,*

Inc. v. Dickinson, 446 N.W.2d 810 (Iowa 1989) (lawyer improperly disqualified under "advocate-witness" rule when representing corporation as its sole shareholder.)

Other Ethical Considerations

Lawyers proceeding *pro se* in a private arbitration must be cognizant of other ethical considerations. In the context of a proceeding, Prof.Cond.R. 3.4(e) restricts a lawyer from "stat[ing] a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant." Prof.Cond.R. 3.4(e). The lawyer's dual role as advocate-witness in an arbitration increases the possibility that the trier of fact may be persuaded by the testimony of a lawyer on the matters referenced in the rule and that the opposing party could be prejudiced by such testimony. However, the lawyer may argue, "based on the lawyer's analysis of the evidence, for any position or conclusion with respect to matters referenced" in the rule. Prof.Cond.R. 3.4, cmt. [3A]. In addition. Prof.Cond.R. 4.2 prohibits a lawyer from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. Prof.Cond.R. 4.2 applies to lawyers representing themselves. *Disciplinary Counsel v. Bruce*, 158 Ohio St.3d 382, 2020-Ohio-85. Lawyers may not directly contact an opposing party known to be represented by a lawyer, even when the lawyer is a party to a matter. *Id.*