UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant v. Scandia Interiors, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100229.

ORDER DENYING COMPLAINANT'S MOTION TO PREVENT RESPONDENT'S COUNSEL FROM ACTING IN THE DUAL CAPACITY OF ADVOCATE AND WITNESS FOR RESPONDENT DURING THESE PROCEEDINGS

On November 8, 1990, Complainant filed an Informative Motion, in which it essentially expressed its concern about the likelihood of Respondent's counsel performing the dual functions of advocate and witness in this case. It is my view, from a careful examination of Complainant's Informative Motion, that the Motion should be construed as a motion to prevent Respondent's counsel from acting in the dual capacity of advocate and witness for Respondent during these proceedings.

On November 15, 1990, I conducted a telephonic conference with both parties. One of the matters discussed during the conference was Complainant's Informative Motion. Respondent's counsel explained that he had just received the Motion the morning of the conference call, and thus was not in a position to adequately discuss the matter. However, Respondent did say that a Response to the Motion would be forthcoming.

Respondent filed its Response to Informative Motion filed by Complainant on November 19, 1990. However, Respondent's Response fails to address the main issue raised by Complainant in its Informative Motion, i.e. whether Respondent's counsel can simultaneously represent Respondent and testify on behalf of Respondent at the hearing. The Response only addresses, in a very cursory fashion, Complainant's secondary concern that the various roles Respondent's counsel has or will assume in these proceedings will create discovery problems due to the assertion of the attorney/client privilege by Respondent.

The question of whether an attorney may act as both advocate and witness in a civil proceeding is not directly addressed by our

regulations, the Federal Rules of Evidence, or the Federal Rules of Civil Procedure. Federal case law, however, has addressed the issue, and generally recognizes that an attorney is competent to testify on behalf of his/her client in a case in which he/she is representing that client. See, French v. Hall, 119 U.S. 152, 30 L.Ed. 375, 7 S.Ct. 170 (1886); Christensen v. United States, 90 F.2d 152 (7th Cir. 1937); Lau Ah Yew v. Dulles, 257 F.2d 744 (9th Cir. 1958); Universal Athletic Sales Co. v. American Gym, Recreational and Athletic Equipment Corp., 546 F.2d 530, cert. den. 430 U.S. 984, 52 L.Ed.2d 378, 97 S.Ct. 1681 (3rd Cir. 1976); United States v. Fogel,, 901 F.2d 23, 26 (4th Cir. 1990); see, also, Director, Attorney as Witness for Client in Federal Case, 9 A.L.R. 500 (1989).

The above cited authority, while recognizing that an attorney is competent to simultaneously act as both witness and counsel for his/her client in a case, repeatedly disapproved of the practice as being improper and against the principles of professional ethics.[1] For example, in Christensen v. United States, supra, the court noted that the practice of an attorney testifying on behalf of his/her client is universally frowned upon, and that the dual relation of attorney and witness in a case is not compatible with the conception of an attorney as an officer of the court, and tends to disrupt the normal balance of judicial machinery.

Ultimately, the decision whether to permit an attorney to testify for his/her client in a case in which the attorney is representing that client is within the broad discretion of the trial judge. See, French v. Hall; supra; Universal Athletic Sales Co., supra (Although the Code of Professional Responsibility inveighs against participation by the client's attorney as a witness in a proceeding, it does not necessarily follow that any such alleged professional misconduct on the attorney's part would in itself nullify his testimony, and the trial court did not commit error solely by admitting the testimony of the attorney under such circumstances.) U.S. v. Fogel, supra (``The question of whether an attorney is competent to

[1]Disciplinary Rule 5-101(B) of the American Bar Association's Code of Professional Responsibility provides that a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and . . . may testify: (1) if the testimony will relate solely to an uncontested matter; (2) if the testimony will relate solely to a matter of formality . . .; (3) if the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer of his firm to the client; and (4) as to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer of this firm as counsel in the particular case.

testify is committed to the discretion of the [court], subject to the normal review for abuse.'').

Furthermore, the trial judge permitting an attorney to testify on behalf of his/her client in the same case in which he/she is representing that client may, justifiably, give less weight to the attorney's testimony, since the attorney's dual roles of witness and advocate can detrimentally effect the credibility of his/her testimony. See, Christensen, supra (The court indicated that an attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism, if not suspicion, and that, having placed himself in an unprofessional position, he must not be surprised if his evidence is impaired.); Lau Ah Yew, supra.

In the present case, it appears that there is a substantial likelihood that Respondent's counsel will have to testify on behalf of his client. The testimony will likely be on a contested issue in the case (i.e. the alleged affirmative defense that Complainant misled Respondent concerning the nature and purpose of the I-9 inspection), rather then on a matter of formality. Thus, under the Code of Professional Responsibility, it would be ethically improper for Respondent's counsel to assume the roles of advocate and witness in this case.

However, with due regard to the ethical concerns involved, it is my view that Respondent's counsel is competent to testify in this case, and may due so if another attorney assumes the role of advocate for Respondent when Respondent's counsel testifies at the hearing. Due to the relative informality of these administrative proceedings, the fact that the finder of fact is the trial judge and not a jury, and the fact that the attorney testifying on behalf of his client will not be in a position to comment upon his own testimony due to the condition of additional counsel I am imposing, the prejudice, if any, which might result from Respondent's counsel testifying for Respondent should be de minimis. Further, because Respondent's pleadings seem to indicate that the best, if not only, evidence in support of its alleged ``notice/estoppel'' affirmative defense is the testimony of Respondent's counsel, a failure to admit counsel's testimony may constitute reversible error. See French v. Hall, supra, (There are some cases in which it may be quite important, if not necessary, that the attorney's testimony should be admitted to prevent injustice or to redress a wrong.).

Accordingly, I find that Respondent's counsel is competent to testify on behalf of Respondent in this proceeding, but may only do so if other counsel assumes the role of advocate for Respondent when Respondent's counsel testifies.

SO ORDERED: This 26th day of November, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge