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Immunity and Justice for All: Has the Second Circuit Overextended the Doctrine of Absolute Immunity by Applying It to Arbitration Witnesses

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NOTES

Immunity and Justice for All: Has the Second Circuit Overextended the Doctrine of Absolute Immunity by Applying it to Arbitration Witnesses?

Rolon v. Henneman[1]

I. INTRODUCTION

In *Rolon v. Henneman*, the Second Circuit Court of Appeals considered whether absolute immunity should apply to witnesses in an arbitration proceeding. The common law doctrine of absolute immunity from civil liability for judges has a long pedigree dating back to English courts.[2] When the United States Supreme Court reaffirmed the doctrine after Congress passed 42 U.S.C. § 1983, the Court cautioned against extending the doctrine beyond judges.[3] Since then, however, the doctrine has been extended to prosecutors and witnesses at public trials, and more recently, to arbitrators and arbitral institutions.[4] Whether absolute immunity should be further extended to witnesses at an arbitration proceeding had not been considered by U.S. courts before *Rolon*.[5] In the instant decision, however, the Second Circuit found that the functional similarity between a witness' testimony in an arbitration proceeding and a witness' testimony in a regular judicial proceeding was sufficient to extend absolute immunity to a witness in an arbitration proceeding.[6] Unfortunately, the court was intentionally[7] vague on the minimum similarities necessary to afford absolute immunity, leaving room for speculation as to when absolute immunity applies and when it does not.

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1. 517 F.3d 140 (2d Cir. 2008).

2. John B. Lewis & Lois J. Cole, *Defamation Actions Arising from Arbitration and Related Dispute Resolution Procedures—Preemption, Collateral Estoppel and Privilege: Why the Absolute Privilege Should Be Expanded*, 45 DEPAUL L. REV 677, 686 (1996).

3. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993).

4. Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 484-94 (2004) (giving a history of arbitrator immunity and arbitral organization immunity from 1880 to 2002).

5. *See generally* Briscoe v. LaHue, 460 U.S. 325, 336-341 (1983) (tracing the history of absolute immunity from the initial incarnation of the act of 1871 until the extension of immunity to witnesses); Weston, *supra* note 4, at 475-95 (outlining the history of absolute immunity up until immunity was granted to arbitrators and arbitral institutions).

6. *Rolon*, 517 F.3d at 145-47.

7. *Id.* at 146 (specifically, the court said, "[w]e need not and do not opine as to the minimum safeguards required in order for absolute immunity to attach in other arbitral settings").

II. FACTS AND HOLDING

Dennis Rolon began working as a law enforcement officer in 1989 and joined the police force of Wallkill, New York in 1997.[8] In April 2000, the town of Wallkill brought disciplinary charges against Rolon.[9] Rolon was suspended for five days without pay in connection with these charges.[10] In August 2000, Robert Henneman, acting chief of the Wallkill Police Department, initiated additional disciplinary proceedings against Rolon.[11] In connection with these charges, Henneman again put Rolon on suspension without pay until the charges were resolved.[12] One of Rolon's fellow police officers, Ari Moskowitz, had informed Henneman of several of the nine acts of misconduct that Henneman alleged against Rolon.[13] In response to the April charges, Rolon filed a federal lawsuit claiming that a number of police officials and the town supervisor had violated his due process rights.[14] Rolon never amended his complaint to include claims against Moskowitz.[15] On January 23, 2001, the parties in the lawsuit reached a settlement in which Rolon agreed to a general release of the claims arising from the April and August disciplinary actions in exchange for $85,000, and the parties agreed to arbitrate Rolon's entitlement to back pay.[16] This agreement included a provision that the arbitration would be conducted in accordance with the terms of the Collective Bargaining Agreement between the town of Wallkill and the town's police union, the Police Benevolent Association.[17]

The arbitration hearing took place over the course of fourteen days between January 24, 2001, and August 31, 2001.[18] The August disciplinary charges were brought into the arbitration hearings, and both Henneman and Moskowitz testified.[19] Moskowitz did not return to the arbitration after a lunch break, and the city refused to compel him to return.[20] As a consequence of Moskowitz's failure to return to the proceedings, the arbitrator struck his testimony entirely.[21] Furthermore, the arbitrator did not find Henneman's testimony truthful or credible and found that Henneman's actions against Rolon were motivated by Henneman's personal feelings toward Rolon.[22] The arbitrator decided that Rolon was guilty of three misconduct charges—amounting to two days' suspension without pay and

8. Rolon v. Henneman (*"Rolon II"*), 443 F. Supp. 2d 532, 534 (S.D.N.Y. 2006).
9. *Id.*
10. Rolon v. Henneman, 517 F.3d at 142.
11. *Rolon II*, 443 F. Supp. 2d at 534.
12. Rolon v. Henneman, 517 F.3d at 142.
13. *Id.*
14. *Rolon II*, 443 F. Supp. 2d at 534.
15. *Id.*
16. *Id.*
17. Rolon v. Henneman, 517. F.3d at 143.
18. *Id.*
19. *Id.*
20. *Id.* During Moskowitz's testimony, the arbitrator told him to produce his personal notebooks from the time leading up to the August disciplinary action. *Id.* Moskowitz left the arbitration at a lunch break in order to return home and get the notebooks and never came back. *Id.*
21. *Id.*
22. *Id.*

oral counseling—and ordered that Rolon be reinstated with full back pay and benefits.[23]

Following the arbitration decision, Rolon filed a suit under 42 U.S.C. § 1983, a civil action for the deprivation of rights, in the U.S. District Court for the Southern District of New York, and he alleged that both Henneman and Moskowitz had "caused him anguish and injury, intentionally violated his right to due process of law, and abused their supervisory positions."[24] Specifically, Rolon alleged "humiliation and economic loss in the form of lost overtime pay."[25] He claimed that Moskowitz's lies to Henneman about Rolon's misconduct led to the disciplinary charges that Henneman levied against Rolon, and that those charges caused Rolon emotional distress.[26]

The district court drafted two opinions[27] regarding Rolon's claims: one with regards to the charges brought against Henneman ("*Rolon I*")[28] and one with regard to the charges brought against Moskowitz ("*Rolon II*").[29] Henneman and Moskowitz both moved for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c), claiming that Rolon's claims were either "barred by res judicata," that Henneman and Moskowitz were "protected by qualified or absolute immunity," or that Rolon "failed to state a cognizable claim for the denial of any substantive due process rights."[30] The court in *Rolon I* said that Henneman, as a testifying witness, had absolute immunity from liability under 42 U.S.C. § 1983, and thus did not need to address the other issues raised.[31] The court held that Henneman had absolute immunity because the arbitration proceeding in which Henneman testified was functionally equivalent to formal judicial proceedings; because Henneman's testimony would have been protected in a formal judicial proceeding, Henneman's testimony should be protected in the arbitration proceeding.[32] Furthermore, the court noted that the law "expressly recognizes that statements made during quasi-judicial proceedings, like those made during formal judicial proceedings, are entitled to absolute immunity."[33]

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23. *Id.* Rolon was found guilty of:

> (1) [failing to timely] comply with directives from Acting Chief Henneman ordering Rolon to move his vehicle from the spot in which it was parked; (2) . . . [failing to timely] respond to a written directive from Henneman ordering Rolon to answer certain questions regarding an arrest he made; and (3) [that Rolon] prepared a memorandum disrespectful of [his] superior, . . . Henneman . . . in which [Rolon] accuse[d] . . . Henneman of carelessness and stupidity.

Id. (internal quotations omitted).

24. *Id.*

25. *Id.*

26. *Id.*

27. Two opinions were necessary because Moskowitz was out of the country for military service when the court issued the first opinion regarding Henneman. *Id.* at 143-44.

28. *See* Rolon v. Henneman ("*Rolon I*"), 389 F. Supp. 2d 517 (2d Cir. 2005).

29. Rolon v. Henneman, 517 F.3d at 143. For information on the charges brought against Moskowitz, *see Rolon II*, 443 F. Supp. 2d 532 (S.D.N.Y. 2006).

30. Rolon v. Henneman, 517 F.3d at 143. Defendants' argument was that Rolon's claim was barred as a result of the previous settlement reached in the prior suit that Rolon had filed in January of 2001. *Id.*

31. *Rolon I*, 389 F. Supp. 2d at 519.

32. *Id.* at 519-20 (discussing Briscoe v. LaHue, 460 U.S. 325, 335-36 (1983); Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993); White v. Frank, 855 F.2d 956, 961 (2d Cir. 1988)).

33. *Id.* at 520 (citing Lettis v. U.S. Postal Serv., 39 F. Supp. 2d 181, 205 (E.D.N.Y. 1998)).

In *Rolon II*, the court determined that: (1) because Rolon had not stated a cognizable claim, the court could not reach the question of whether Moskowitz was immune from liability; and (2) because the entirety of Moskowitz's testimony was struck by the arbitrator, there was "no testimony to which immunity can attach" and "no testimony on which a false testimony claim can be based."[34] The court, instead of directly addressing the issue of immunity, considered whether Rolon's due process rights under 42 U.S.C. § 1983 had been violated based either on a theory of malicious prosecution or a theory of fabrication of evidence.[35] The court held that Rolon's due process rights under Section 1983 had not been violated based on either theory because Rolon had not been arrested or otherwise detained, he was not subject to real criminal prosecution, and there was no violation of his liberty [36] Thus, there had been no violation of his Fourth Amendment due process rights.[37]

Rolon appealed both decisions to the Second Circuit Court of Appeals.[38] On appeal, the court addressed all three issues discussed by the district court.[39] As to Rolon's claim against Moskowitz, the Second Circuit followed the district court's lead and divided Rolon's claim into two causes of action: malicious prosecution and fabrication of evidence.[40] The court held that because there was no violation of Rolon's Fourth Amendment rights, Rolon could not recover from Moskowitz on the theory of malicious prosecution.[41] With regard to the fabrication of evidence cause of action, the court held that because Rolon alleged only the deprivation of property, and not a constitutional injury or a deprivation of liberty, he failed to state a legally cognizable claim under Section 1983 for falsification of evidence.[42] Finally, with respect to Rolon's claim against Henneman, the court held that because the nature of the arbitration proceeding was substantially similar to formal judicial proceedings, and because Henneman performed the "same function" that he would have as a formal judicial witness, Henneman should be granted absolute immunity.[43]

III. LEGAL BACKGROUND

A. Absolute and Qualified Immunity from Liability Under 42 U.S.C. § 1983 and the "Functional" Approach

Absolute immunity is not explicitly referenced in 42 U.S.C. § 1983.[44] However, the Supreme Court has held that Congress did not intend to remove any immunities that had already been well-established in 1871 when Congress enacted

34. *Rolon II*, 443 F. Supp. 2d at 536.
35. *Id.* at 537-39.
36. *Id.* at 538-39.
37. *Id.*
38. Rolon v. Henneman, 517 F.3d 140, 144 (2d Cir. 2008).
39. *Id.* at 145-49.
40. *Id.* at 147-48.
41. *Id.* at 147.
42. *Id.* at 148-49.
43. *Id.* at 146.
44. *See* 42 U.S.C. § 1983 (2000).

the first iteration of Section 1983.[45] Still, the Supreme Court was careful to limit the possibility of new immunities drawn from Section 1983. Essentially, the Court recognized two basic types of immunities: "qualified immunity" and "absolute immunity."[46] Under the qualified immunity standard, public officials who exercise "good faith" will be granted immunity.[47] A public official exercises good faith when her actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[48] On the other hand, a public official is not eligible for immunity when her acts are done with a malicious intent to cause a deprivation of constitutional rights.[49] Conversely, absolute immunity protects against any Section 1983 liability "regardless of the conduct" and is granted to a substantially smaller class of government officials.[50] The Supreme Court has further extended absolute immunity to include officials who perform "special functions" that would not have been granted immunity under the original 1871 common law rules.[51] For instance, judges and prosecutors are granted absolute immunity while in the performance of their official duties, as are "quasi-judicial" agency officials who perform actions "essentially similar to those of judges or prosecutors, in a setting similar to that of a court."[52] In a concurring opinion in *Imbler v. Pachtman,* Justice White explained that the policy reason for this extension is to protect the judicial process by shielding judges and prosecutors from fear of liability.[53] He reasoned that the judicial process would be undermined if those involved in judicial proceedings feared reprisal for their actions.[54]

However, judicial immunity, which is a type of absolute immunity, is limited to actions that judges take with regard to "judicial acts."[55] While a "judicial act" is difficult to define, the Supreme Court in *Forrester v. White* distinguished a judge's administrative function from his judicial function when it refused to apply absolute immunity to a judge's actions when he fired a probation officer.[56] This was the first time that the Supreme Court enumerated what is known as the "functional" approach, where a court looks to the function that the individual is per-

45. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993). In the 1996 amendment to Section 1983, Congress explicitly spelled out that judicial officials would be immune from injunctive relief unless there was a violation of a declaratory decree or if declaratory relief is unavailable. 42 U.S.C. § 1983.

46. *Buckley*, 509 U.S. at 268-69.

47. *See* Wesley Kobylak, *Immunity of public officials from personal liability in civil rights actions brought by public employees under 42 U.S.C.A. § 1983*, 63 A.L.R. FED. 744 (1983).

48. *Buckley*, 509 U.S. at 268.

49. *See* Kobylak, *supra* note 47.

50. O'Neal v. Miss. Bd. of Nursing, 113 F.3d 62, 65 (5th Cir. 1997). *But see* Burke v. Miller, 580 F.2d 108, 110 (5th Cir. 1978) (reiterating that judges can be "punished criminally for willful deprivations of constitutional rights").

51. *Buckley*, 509 U.S. at 268.

52. *O'Neal*, 113 F.3d at 65. *See* Bradley v. Fisher, 80 U.S. 335, 352 (1871) (establishing absolute immunity for judges); Yaselli v. Goff, 12 F.2d 369, 402 (1926) (establishing absolute immunity for prosecutors); Butz v. Economou, 438 U.S. 478, 512-13 (1978) (establishing absolute immunity for quasi-judicial officials).

53. 424 U.S. 409, 439 (1976) (White, J., concurring).

54. *Id.*

55. *Fisher*, 80 U.S. at 347.

56. 484 U.S. 219, 229-30 (1988).

forming, rather than the role that the individual fulfills.[57] Thus, a judge's immunity is limited to the actions he takes with regard to his judicial function.[58]

A court will likewise apply the "functional" approach in deciding whether to extend absolute or qualified immunity to a government official.[59] Essentially, "immunity attaches to particular official functions, not to particular offices."[60] If the official is performing a function that is similar to one that would have been granted immunity when Congress enacted Section 1983, then she should be granted immunity.[61] In making the immunity determination, a court must weigh the policy reasons for granting absolute immunity versus the unnecessary expansion of the traditional scope of absolute immunity.[62] In deciding whether to apply absolute or qualified immunity, courts, in part, consider the adversarial nature of the process in which the individual is involved (the more similar in nature the process is to a standard adversarial trial, the more functionally similar the individual's role is to one already protected by absolute immunity) and the correctability of error on appeal (with regard to the checks on an official's power, there is less of a need for private liability damages where an official's error is subject to appeal).[63]

B. Extension of Absolute Immunity to Testifying Witnesses

The overriding public policy behind witness immunity is the belief that "the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible."[64] The Supreme Court outlined two reasons why private witness immunity furthers this goal of unobstructed truth. First, a witness may be reluctant to testify if she knows that there are potential damages associated with her testimony; second, a witness who does testify might shade her testimony in the hopes of avoiding future liability.[65] Furthermore, fear of liability is not necessary to keep a witness from deviating too far from the truth; the nature of the adversarial system, especially cross-examination, prevents a witness from distorting evidence beyond the bounds of reasonableness.[66] Under common law, absolute immunity was granted to all persons considered "integral parts of the judicial process."[67] Section 1983 did not dispose of these common law policies for maintaining witness immunity, despite its broad text.[68]

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57. *Id.* at 227.
58. *Id.* at 228.
59. *Id.* at 224.
60. *O'Neil*, 113 F.3d at 65.
61. *Buckley*, 509 U.S. at 268-69.
62. *Forrester*, 484 U.S. at 224.
63. *O'Neal*, 113 F.3d at 65 (citing Cleavinger v. Saxner, 474 U.S. 193, 202 (1985)). Other factors listed by the court are: the need to assure that the individual can perform his functions without harassment or intimidation caused by potential liability; the existence of safeguards to control unconstitutional conduct that already reduce private damage claims; the need to insulate an office from political influence; and maintaining longstanding precedent. *Id.* No one factor is controlling. *Id.*
64. Briscoe v. LaHue, 460 U.S. 325, 332-33 (1983).
65. *Id.* at 333.
66. *Id.*
67. *Id.* at 335.
68. *Id.* at 334. The Court in *Briscoe* noted that "[e]very person" in Section 1983 "is not to be taken literally." *Id.* at 330.

In *Briscoe v. LaHue*, the Supreme Court explicitly extended the absolute immunity of private witnesses to police officers who appear as witnesses in judicial proceedings.[69] The Court reasoned that when a police officer appears as a witness, he is under the same requirements to tell the truth as a private witness and should therefore be liable in all of the same ways.[70] Since a private witness enjoys absolute immunity from Section 1983 liability, so should a testifying police officer.[71] Also, because a police officer can be regarded as an official who is acting as an "integral part[] of the judicial process," he should be granted absolute immunity in the same way that any other official fulfilling such a role would be granted absolute immunity.[72] The Court further emphasized that common law immunity drew no such distinctions between private witnesses and government witnesses, and it found no evidence in the legislative history of Section 1983 suggesting that Congress wished government officials acting as witnesses to be treated any differently than private citizens acting as witnesses.[73]

C. Extension of Absolute Immunity to Arbitrators

Despite early concern in U.S. courts over the judicial quality of arbitration,[74] many federal Courts of Appeals have immunized arbitrators from civil liability.[75] Courts have applied the "functional" approach and found that there is enough "functional comparability" between arbitrators and judges to warrant absolute immunity for arbitrators; moreover, arbitrator immunity furthers the same policy concerns for independent judgment free from intimidation and undue influence.[76] The Second Circuit has granted arbitrators "protection analogous to that traditionally accorded to judges."[77] Furthermore, the Second Circuit decided that individuals would not volunteer to arbitrate if they feared lawsuits stemming from their decisions.[78] As a result, the court held that arbitrators are absolutely immune from liability for all actions "within the scope of the arbitral process."[79]

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69. *Id.* at 335-41.
70. *Id.* at 335-36.
71. *Id.* at 336.
72. *Id.*
73. *Id.* at 336 n.15, 341.
74. *See* Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration* Experience, 38 HASTINGS L. J. 239, 254-55 (1987) (claiming that judicial hostility existed with regards to arbitration because of "quality-of-justice concerns," including: a common law lack of ability to administer oaths, compel attendance of witnesses, compel the production of documents, or insist upon a "discovery of facts from the parties under oath," and calling into question the arbitration's system of fact-finding).
75. Austern v. Chi. Bd. Options Exch., Inc., 898 F.2d 882, 886 (2d Cir. 1990) (citing Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987); Ozark Air Lines, Inc. v. Nat'l Mediation Bd., 797 F.2d 557, 564 (8th Cir. 1986); Austin Mun. Secs., Inc. v. Nat'l Ass'n of Secs Dealers, Inc., 757 F.2d 676, 686-91 (5th Cir. 1985); Corey v. N.Y. Stock Exch., 691 F.2d 1205, 1208-11 (6th Cir. 1982); Tamari v. Conrad, 552 F.2d 778, 780 (7th Cir. 1977); Cahn v. Int'l Ladies' Garment Union, 311 F.2d 113, 114-15 (3d Cir. 1962)).
76. *Corey*, 691 F.2d at 1211.
77. *Austern*, 898 F.2d at 886.
78. *Id.*
79. *Id. But see* Weston, *supra* note 4, at 499-501 (arguing that private individuals should not necessarily be granted the same immunities and benefits as public officials just by performing tasks similar

The application of immunity is clearly expanding. United States courts have found that judges and witnesses have absolute immunity from Section 1983 liability based on a common law history of immunity.[80] This immunity was split into absolute and qualified immunity with regard to government officials.[81] Courts then moved from private witness immunity to government and police witness immunity.[82] Finally, the courts have applied the absolute immunity doctrine to arbitrators and arbitral institutions.[83] Logically, the next move from absolute immunity of arbitrators is absolute immunity for witnesses in arbitration proceedings.

IV. INSTANT DECISION

In *Rolon v. Henneman,* the Second Circuit was faced with determining the extent, if any, of witness immunity from Section 1983 liability in arbitration proceedings.[84] The court first addressed Rolon's claims against Henneman and then Rolon's claims against Moskowitz.[85] In addressing the issue of Henneman's immunity, the Second Circuit discussed how the U.S. Supreme Court has extended absolute immunity to police officers when testifying in judicial proceedings.[86] The Second Circuit emphasized the policy reasons for extending absolute immunity to police officers.[87] Specifically, the court noted the concern that if police officers were held civilly liable for their testimony, they would be less likely to want to testify as witnesses, and would be less apt to provide "candid, objective and undistorted evidence."[88] The court contrasted this concern with the possibility that police officers and other witnesses might provide intentionally false testimony knowing that they are absolutely immune to some forms of civil liability.[89] The Second Circuit agreed with the Supreme Court's analysis in *Briscoe*, however, and found that the "functional" approach should determine when absolute immunity is appropriate—that is, the functional role of an individual, rather than the identity of the individual, should be the determining factor for when absolute immunity applies.[90]

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to public officials' tasks, and that assumptions about the necessity of encouraging arbitration are no longer necessary).

80. *See* Bradley v. Fisher, 80 U.S. 335 (1871) (establishing absolute immunity for judges); Briscoe v. LaHue, 460 U.S. 325 (1983) (extending absolute immunity to trial witnesses).

81. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993); Forrester v. White, 484 U.S. 219, 224 (1988); Butz v. Economou, 438 U.S. 478, 506 (1978).

82. *Briscoe*, 460 U.S. at 332-33.

83. Jones v. Brown, 6 N.W. 140, 142-43 (Iowa 1880) (the first case granting absolute immunity to arbitrators); Austern v. Chi. Bd. of Options Exch., Inc., 898 F.2d 882, 885 (2d Cir. 1990); *see* Olson v. Nat'l Ass'n of Secs. Dealers 85 F.3d 381, 383 (8th Cir. 1996) (granting absolute immunity for arbitration organizations).

84. 517 F.3d 140 (2d Cir. 2008).

85. *Id.* at 145-49. Because Rolon's claims against Moskowitz do not address the issue of witness immunity, they will not be discussed here.

86. *Id.* The court cited *Briscoe v. LaHue*. *Id.* at 145. For a brief discussion of that decision, see *supra*, note 5.

87. *Id.* at 145.

88. *Id.*

89. *Id.*

90. *Id.*

The court then considered its own extension of absolute immunity to arbitrators in *Austern v. Chicago Board of Options Exchange, Inc.*[91] Applying the "functional" approach, the court determined in *Austern* that the function of an arbitrator was similar enough to the function of a judge to warrant absolute immunity.[92] The court recognized that the policy rationale in *Briscoe* applies to arbitration proceedings at least as much as it does to formal judicial proceedings.[93] Also, the court found that Henneman had testified in a substantially similar manner in the arbitration proceeding as he would have in a judicial proceeding, "with nearly identical procedural safeguards."[94] Therefore, applying the Supreme Court's functional reasoning in *Briscoe* and the Second Circuit's own extension of immunity to arbitrators, the court held that because Henneman would have been granted absolute immunity at trial, and because he performed the same function at the arbitration proceeding as he would have performed at trial, he should be granted absolute immunity.[95] However, the court specifically declined to establish a set of "minimum safeguards" to determine when absolute immunity should apply to a witness' testimony in an arbitration proceeding.[96] Instead, the court found only that this particular arbitration proceeding "encompassed an adequate number of safeguards" so that its function "sufficiently mirrored the judicial process."[97]

V. COMMENT

It is difficult to predict what impact, if any, this decision will have on future arbitrations. While not limiting the holding to the facts of this specific case, the Second Circuit has limited witness immunity to cases where the witnesses testify in a functionally similar manner to how they would testify in trial.[98] However, while the court listed some procedural safeguards, it specifically declined to establish which of those safeguards were necessary, how many were necessary, and whether any other safeguards might be applicable.[99] Furthermore, there is little discussion regarding the policy considerations behind extending absolute immunity to witnesses at arbitrations.[100] Consequently, a number of questions remain regarding the policy, the applicability of arbitration witness immunity, and the limitations of arbitration witness immunity.

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91. *Id.* (discussing Austern v. Chi. Bd. of Options Exch., Inc., 898 F.3d 882 (2d Cir. 1990)).
92. *Id.* (quoting *Austern*, 898 F.3d at 886).
93. *Id.* at 145-46.
94. *Id.* at 146. The court specifically listed the following safeguards: the witness "took an oath, offered testimony, responded to questions on direct and cross-examination, and could have been prosecuted for perjury." *Id.*
95. *Id.* at 146-47.
96. *Id.* at 146.
97. *Id.*
98. Rolon v. Henneman, 517 F.3d 140, 146, 147 n.3 (2d Cir. 2008).
99. *Id.* at 146. For the list of safeguards see *supra*, note 74.
100. *Id.* at 145-46. The Court stated:

> The policy rationale for witness immunity . . . applies with equal or near equal force in the arbitral context: [T]he truthfinding process is better served if the witness's testimony is submitted to the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.

Id. (quoting Briscoe v. LaHue, 460 U.S. 325, 333-334 (1983) (internal quotations omitted)).

A. Functional Equivalence and Necessary Safeguards

The court determined that there were enough procedural safeguards present in the *Rolon* arbitration to make it functionally equivalent to a regular judicial proceeding.[101] While the Second Circuit did not indicate which of the safeguards it mentioned were necessary to guarantee absolute witness immunity, it may be possible to distill an answer to this question by reviewing the procedural safeguards U.S. courts have found sufficient to grant absolute immunity to testifying witnesses.

One significant category of safeguards that courts seem to rely on is the adversarial nature of the judicial proceeding.[102] This would encompass a number of safeguards, including: providing the opportunity to cross-examine the witness, having a an impartial third party determine the veracity of the witness' statements, and providing the other side with an opportunity to present witnesses and evidence on his behalf. The adversarial nature of a proceeding is not dispositive, however. In certain *ex parte* proceedings, such as habeas corpus proceedings[103] and grand jury proceedings,[104] witnesses have been granted absolute immunity from civil liability for their testimony. Furthermore, witnesses who testify by deposition or affidavit[105] have also qualified for absolute immunity. Thus, a witness may still receive absolute immunity even if the proceeding is not adversarial in character.

Another safeguard that is common for justifying absolute immunity in judicial proceedings—and one that was mentioned in *Rolon*—is the requirement that the witness take an oath.[106] The oath is a significant guarantee ensuring that criminal liability, in the form of perjury, would still be available as a way to ensure truthful testimony.[107] Unfortunately, there have been situations where courts granted absolute immunity to quasi-judicial bodies that had no oath requirement.[108] Even if it is not a necessary element for absolute immunity, the oath

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101. *Id.* at 146.

102. *E.g.*, Butz v. Economou, 438 U.S. 478, 513 (1978) (listing as procedural safeguards:

> [t]he proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence . . . and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record . . .

Id. (internal citations omitted).

103. *See* Sykes v. James, 13 F.3d 515, 521 (2d Cir. 1993) (enough procedural safeguards were in place, despite the fact that cross-examination was not available).

104. *E.g.*, Lyles v. Sparks, 79 F.3d 372, 378 (4th Cir. 1996); Anthony v. Baker, 955 F.2d 1395, 1400-01 (10th Cir. 1992); San Filippo v. U.S. Trust Co. of N.Y., Inc., 737 F.2d 246, 254 (2d Cir. 1984); Kincaid v. Eberle, 712 F.2d 1023, 1023-24 (7th Cir. 1983); Briggs v. Goodwin, 712 F.2d 1444, 1448-49 (D.C. Cir. 1983).

105. *E.g.*, Cruz v. Kauai County, 279 F.3d 1064, 1068 (9th Cir. 2002) (citing Burns v. County of King, 883 F.2d 819, 821-23 (9th Cir. 1989) for the proposition that "a person who functions as a witness in an adversarial proceeding . . . is to be accorded absolute immunity for her testimony, even if the witness's testimony is provided by way of affidavit"); Giffin v. Summerlin, 78 F.3d 1227, 1231 (7th Cir. 1996) ("The policy considerations underlying witness immunity for testimony in open court apply with equal force to other forms of testimony such as depositions and affidavits").

106. Rolon v. Henneman, 517 F.3d 140, 146 (2d Cir. 2008).

107. *Id.* (when discussing the procedural safeguards in place during Henneman's testimony, the court specifically notes that Henneman "could have been prosecuted for perjury").

108. *See* Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights* Cases, 59 SMU L. REV. 265, 297-313 (2006) (dis-

requirement is still a significant factor as it helps keep the public from becoming "powerless to deter misconduct or to punish" witnesses who give false testimony.[109]

It would seem that no single safeguard mentioned by the court in *Rolon* is enough to universally grant absolute immunity. Perhaps just a number of the procedural safeguards guaranteed by a trial are necessary. That still leaves the problem, however, of how many safeguards are necessary. Furthermore, if procedural safeguards are all just factors in a larger test, how should each of the safeguards be weighed? Should the ability to cross-examine the witness receive more weight than the quasi-judicial body's oath requirement? What about a defendant's right to notice or his ability to present evidence and witnesses on his or own behalf? These are important questions to answer because the landscape of arbitration is largely defined by the parties and the arbitrators. Further guidance as to what safeguards are necessary to grant immunity would allow the parties in an arbitration proceeding to guarantee absolute immunity to any witnesses that might have reservations about testifying.

Despite the lack of clarity on necessary minimum safeguards, by holding that the minimum had been met, the court in *Rolon* has still defined at least one set of safeguards that are sufficient to provide absolute immunity. That is, if an arbitrator or parties involved in an arbitration would like to guarantee absolute immunity to witnesses' testimonies, they can do so by instituting the same safeguards that the court found sufficient in *Rolon*. As a practical matter, the court has provided a viable set of safeguards without ever defining the necessary minimum safeguards.

B. Policy Rationale as an Alternative to Minimum Safeguards

In future decisions that deal with arbitral immunity for witnesses, courts can at least look to the safeguards described in *Rolon*. Alternatively, courts could eschew the analysis of procedural safeguards and instead consider whether the policy rationales behind witness immunity exist in the instant case. The Sixth Circuit Court of Appeals utilized this approach in *Todd v. Weltman, Weinberg & Reis Co., L.P.A* and determined that if one of *Briscoe's* two rationales for granting absolute immunity did not apply, immunity should not be extended.[110] Thus, immunity is only necessary where the witness would be reluctant to come forward without that immunity or if his testimony would be distorted by the fear of subsequent liability. In *Rolon*, the application of this rationale would suggest that Henneman should be granted immunity. Under the Sixth Circuit's policy reasons for granting absolute immunity to testifying witnesses, the reluctance of witnesses to testify in future arbitration proceedings would alone justify extending absolute witness immunity in an arbitration proceeding, regardless of whether the minimum procedural safeguards had been met. Arguably, if Henneman had been held civilly liable for his testimony, future witnesses may be reluctant to come forward to testify. Furthermore, it does not matter whether Henneman's testimony would

cussing cases where absolute immunity was granted to witnesses and quasi-judicial organizations where no oath was required).

109. Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

110. *Todd*, 434 F.3d 432, 442-43 (6th Cir. 2005).

have been distorted by the fear of subsequent liability because just meeting one of the two rationales is enough under the Sixth Circuit's analysis. Still, the application of this policy standard is not as broad as it may initially sound. For example, in *Todd,* the Sixth Circuit held that a debt-collection agency's financial interests outweighed any fear or reluctance that the agency might have had about coming forward to testify.[111]

Even without specific guidance as to the minimum safeguards necessary to guarantee witness immunity, application of the Sixth Circuit's policy considerations can justify extending absolute immunity to witnesses in certain arbitration proceedings. Potential arbitration disputants should be aware of both the Second Circuit's minimum safeguard's rationale and the Sixth Circuit's public policy rationale and, in the event that a disputant wants to assert immunity for his witnesses, he should appeal to the rationale that is most applicable. Arbitration disputants who do not want witnesses to be granted immunity for their testimony may find it difficult to avoid in light of the continual expansion of the absolute immunity doctrine.

VI. CONCLUSION

It is difficult to say what exactly the long-term effects will be of extending witness immunity. The applicability of the holding in *Rolon*, that given the proper safeguards, arbitration witnesses should be given absolute immunity, appears to be very limited and may have little to no effect in certain areas of arbitration, such as commercial arbitration. That being said, the door to witness immunity in arbitration proceedings has now been opened. At the very least, one hopes that the next court which confronts this issue will give more guidance as to exactly when witness immunity applies and when it does not.

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111. *Id.* at 443.