ADVISORY ETHICS OPINION 2001-06

SYNOPSIS:

An attorney may not serve as an arbiter on an arbitration panel when one of the parties in arbitration is an ongoing client of the attorney, even though the attorney is not representing the client with respect to the matter in arbitration.

FACTS:

Attorney A has been asked to serve as a party-appointed arbiter in an underinsured and uninsured motorist case by an insurance company which is a party to the arbitration. Attorney A represents the party insurer on an on-going basis but does not represent insurer in connection with the matter being arbitrated. The policy provides that where the insurer and insured disagree as to the liability of the tortfeasor or the amount of damages, they may resolve the dispute by arbitration. The policy provides that the arbitration panel will consist of three arbiters: the insured chooses an arbiter, the insurer chooses an arbiter, and then the two chosen arbiters pick a third one. Quite often the insured will choose an attorney who does mainly plaintiff's work as an arbiter, and the insurer will pick an attorney who does mainly defense work. The policy does not expressly prohibit an attorney who represents the insurer in other matters from serving on an arbitration panel where the insurer is a party. There is no contractual prohibition against a client's attorney serving as a party-appointed arbiter.

QUESTIONS PRESENTED:

Whether the Vermont Rules of Professional Conduct bar Attorney A from serving as a party-appointed arbiter in the case in which one of the parties is a client of Attorney A, even though Attorney A does not represent the client in the matter submitted to arbitration.

DISCUSSION:

An arbitration proceeding, though contractually based, is analogous to a quasi-judicial proceeding in which the decision-makers are charged with reaching a fair result after hearing the evidence. Unlike judicial proceedings, in arbitration proceedings where a panel of three arbiters is employed, it is accepted that the arbiter selected by each party may share a predisposition favorable to that party's general philosophical point of view; but the arbiters are, nonetheless, obliged to determine a fair result within the context of the arbitration proceeding and based upon the evidence presented. Although arbiters may not be disqualified because they harbor personal philosophical biases and views, they are, nonetheless, required to be impartial in the sense that they do not have any private personal stake in the matter or potential pecuniary advantage that would influence their decision.

We conclude that an arbiter who has a direct financial or relationship interest in the matter in arbitration or to any of the parties in arbitration should be disqualified, and where the arbiter is an attorney, must be disqualified. Our conclusion is based on Rule 8.4(d) which prohibits an attorney from engaging in conduct prejudicial to the administration of justice. Any outside financial benefit to the arbiter which goes beyond the payment agreed to for all arbiters in the proceeding would fundamentally undermine the integrity of the arbitration process and would violate Rule 8.4(d). For example, it would clearly not be proper for a party to offer an arbiter a contingency fee for the right outcome in arbitration.

In the instant case, one of the parties in the arbitration is a current client of the proposed arbiter. The arbiter has a duty of loyalty to the client and a pecuniary interest tied to maintaining a successful relationship with the client. These circumstances require that the proposed attorney-arbiter not serve as an arbiter in the instant proceeding. There may be rare circumstances upon which full disclosure of consent by the adverse party will suffice, i.e., where the connection to the attorney and client are more tenuous than on the facts presented here.