ADVISORY ETHICS OPINION 2003-01

SYNOPSIS:

A lawyer may not serve as an arbitrator in a workers' compensation arbitration conducted pursuant to Vermont Department of Labor and Industry Workers' Compensation Rule 8 when the lawyer currently represents one or more of the insurers involved in the dispute. However, if the lawyer previously has represented one of more of the parties to the arbitration and that representation is concluded, the lawyer can serve as arbitrator if full disclosure is made and all parties consent.

QUESTIONS PRESENTED:

In workers' compensation arbitrations where the only issue to be decided is responsibility for workers' compensation payments between insurance carriers, can an attorney serve as the arbitrator to render a decision when this attorney has or does represent one or more of the insurance carriers involved in the dispute if full disclosure is made and all parties consent?

ANALYSIS:

In Advisory Ethics Opinion 2001-06, this Committee concluded that: " 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 and arbitration." This conclusion was based, inter alia, on our view that arbitrators are "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." Based upon Vermont Rule of Professional Conduct 8.4(d), which prohibits an attorney from engaging in conduct prejudicial to the administration of justice, we found in Opinion 2001-06 that: "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." Because "the arbiter has a duty of loyalty to the client and a pecuniary interest tied to maintaining a successful relationship with the client," we decided that an attorney cannot serve as arbitrator on an arbitration panel in a proceeding in which one of the lawyer's clients is a party.

We recognize that there is authority to the contrary. The Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association concluded in Opinion No. 96-180 that, if a lawyer has an attorney-client relationship with an insurer involved in an uninsured/ underinsured motorist arbitration, the lawyer may not serve as an arbitrator without disclosure and consent. The American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes (the "Arbitration Ethics Code") similarly preserves "the freedom of parties to agree on whomever they choose as an arbitrator," and states that: "When parties, with knowledge of a person's interests and relationships, nevertheless desire that individual to serve as an arbitrator, that person may properly serve." Thus, Rule II(A) of the Arbitration Ethics Code provides that: "Persons who are requested to serve as arbitrators should, before accepting, disclose (1) any direct or indirect financial or personal interest in the outcome of the arbitration; [and] (2) any existing or past financial, business, professional, family, or social relationships which are likely to affect impartiality or which might reasonably create an appearance of impartiality or bias. . . ." The Arbitration Ethics Code does not, however, preclude service as an arbitrator by a lawyer who has an ongoing attorney-client relationship with a party to the arbitration. Rather, it allows such service after disclosure and consent. Cf. Close v. Motorists Mut. Ins. Co., 486 N.E.2d 1275, 1278-79 (Oh. App. 1985) (vacating arbitration award where lawyer/arbitrator failed to disclose his firm's ongoing representation of party to arbitration, and noting that "we emphasize the duty of inquiry and disclosure. When such is done, any possible conflict can be resolved by the parties prior to hearing.").

Notwithstanding this contrary authority, Opinion 2001-06 takes a more restrictive view pursuant to Rule 8.4(d). Moreover, Opinion 2001-06 is supported by other provisions of the Rules of Professional Conduct. Rule 1.12(b), relating to "Former Judge or Arbitrator," states that: "A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or arbitrator." Given the Rules' prohibition on a lawyer/ arbitrator seeking employment with a party to the arbitration, it follows that the lawyer/arbitrator is prohibited from current employment by or representation of a party to the arbitration. In addition, Rule 1.12(d) provides that: "An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party." It is appropriate to infer that, although a lawyer/arbitrator can establish

an attorney-client relationship with and represent a party to an arbitration after the arbitration is concluded, a lawyer cannot serve as arbitrator when the lawyer currently represents a party to the arbitration.

The inquiry now before the Committee does not present facts which lead to a different conclusion from that reached in Opinion 2001-6, and the Committee discerns no basis to diverge from its previous Opinion based upon a difference in the matters at issue in uninsured motorist and workers' compensation arbitrations. In both situations, the lawyer/arbitrator stands to gain a potential pecuniary advantage from making a decision that favors the current client in a manner that fundamentally undermines the integrity of the arbitration process. This would be prejudicial to the administration of justice and violate Rule 8.4(d). Neither would the prejudice to the administration of justice be eliminated if the lawyer/arbitrator represents more than one of the insurance carriers involved in the arbitration, since the lawyer/arbitrator still would have a private personal stake in the matter or stand to obtain a pecuniary advantage that could influence the lawyer/arbitrator's decision.

Workers' Compensation Rule 8 issued by the Vermont Department of Labor and Industry reaffirms this conclusion. Rule 8.2111 provides that: "An arbitrator shall be unbiased toward the parties and free of financial or other interest in the claim or the outcome." This Rule does not allow a lawyer who has an interest in the outcome of the arbitration to serve as arbitrator, even with disclosure and consent. Moreover, arbitration proceedings pursuant to Workers' Compensation Rule 8 are conducted before one arbitrator. The risk that led to our Opinion 2001-06, which prohibits a lawyer from serving on a panel of arbitrators where the lawyer has an ongoing attorney-client relationship with a party to the arbitration, applies with even greater force when there is only one arbitrator.

The inquiry now before the Committee also questions whether a lawyer who has previously represented one or more of the insurance carriers involved in the arbitration can serve as an arbitrator if full disclosure is made and all parties consent. We conclude that, if the lawyer/ arbitrator does not have a current relationship with any parties to the arbitration, but only has a former attorney-client relationship with a party (see, e.g., Vermont Rule of Professional Conduct 1.9), the potential for pecuniary gain which was the foundation for our decision in Opinion 2001-6 no longer exists, and service as an arbitrator following full disclosure and consent is not prohibited by the Rules.