ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 96-6

Ethical Considerations When Acting As An Arbitrator In One Proceeding And As An Advocate In Another Proceeding

The Committee has been asked to resolve ethical questions which may arise when an attorney who normally acts as an advocate on behalf of clients is asked also to serve as an arbitrator. In the factual situation presented to the Committee, the arbitration involves a dispute between an insurance company and its insured. Pursuant to the uninsured motorist provisions of the insurance policy each side chooses an arbitrator. The two arbitrators thus chosen will choose a third arbitrator to complete the panel. The attorney in question has been asked to serve as one party's arbitrator.

The attorney represents other parties in similar uninsured motorist arbitrations and sometimes litigates against the insurance company. Some of the legal issues to be decided by the attorney as arbitrator may be similar or identical to issues for which the attorney is acting as advocate before other arbitration panels. The question asked of the Committee is whether the attorney can ethically serve as an arbitrator under these circumstances. If so, what are the attorney/arbitrator's ethical responsibilities in this situation? The Committee concludes that, absent evidence of facts which suggest that the attorney has a conflict relating to the specific matter at hand, and is therefore unable to act fairly and in good faith as a member of the arbitration panel, the attorney is not ethically barred from acting as arbitrator.

This question raises issues in two directions. First, an attorney who represents clients before other arbitration panels may not accept employment as an arbitrator if the employment would result in a conflict of interest with his present clients. Rule 1.7 of the

Alaska Rules of Professional Conduct states as follows:

> CONFLICT OF INTEREST: GENERAL RULE
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client in the same or a substantially related matter, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consults after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyers' own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, a consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall act with reasonable diligence in determining whether a conflict of interest, as described in paragraphs (a) and (b) of this rule, or Rules 1.8, 1.9 and 1.10 exists.

There is nothing inherent in the situation of the attorney acting as arbitrator that creates an insurmountable conflict. The attorney's service as arbitrator would not require the attorney to modify or change positions being advanced on behalf of other clients in other arbitrations or other forums. The attorney acting as arbitrator cannot render a decision in one arbitration which would have a binding, precedential affect on another panel or a different forum. Similarly, the attorney arbitrator is free to make decisions in the context of the arbitration without fear that these decisions will adversely impact other clients' interests.[1]

[1] This opinion deals only with the question whether the situation raised inherently creates a conflict. Specific facts might change the situation. For example: a different issue might exist if the attorney acting as arbitrator was sitting on a panel which included persons who are also arbitrators in cases in which the attorney acts as an advocate. Under those circumstances, the possibility of improper conflict is more direct. An arbitrator who does work for an insurance company may face a direct financial conflict because of a perception that the ability to obtain future insurance related work may depend on whether the arbitrator rules favorably to the insurance company's interest in a particular arbitration proceeding. See Donegal Ins. Co. v. Longo, 610 A.2d 466,468 (Pa. Super. 1992) (Undisclosed representation of insurance company

The situation ethically is similar to the situation in which the attorney represents different clients and argues conflicting rules of law before different tribunals. Although the attorney must be careful to avoid conflict, there is nothing inherently improper about the situation. See ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.7 and commentary (a lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected).; ABA Formal Opinion 93-377 (October, 1993) (if lawyer reasonably believes representation will not have a significant impact on resolution of issue in second case and will not cause lawyer to "soft pedal" representation of one client in favor of another, dual representation is permitted upon full disclosure and with both clients' permission.)

The other ethical question that must be resolved is the attorney/arbitrator's ethical responsibilities as a member of the arbitration panel.

As an arbitrator, an attorney has an obligation to act fairly and to avoid either impropriety or the appearance of impropriety in reaching conclusions. In City of Fairbanks Municipal Utility System v. Lees, 705 P.2d 457, 463 (Alaska 1985), the Alaska Supreme Court noted that arbitrators should "avoid the appearance of impropriety by following the American Arbitration Association Guidelines, which call for disclosure of any contacts or associations with either party." However, the obligation to avoid impropriety is not the same as an obligation to hold no opinion in the general subject matter area of the arbitration. Indeed, one of the advantages of arbitration is that arbitrators presumably will be drawn from those who have some expertise and knowledge in the area:

> As arbitrators are usually knowledgeable individuals in a given field, often they have interests and relationships that overlap with the matter they are considering as arbitrators. The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.

Florasynth v. Pickholz, 750 F.2d 171, 173-74 (2nd Cir. 1984). See Commonwealth Coatings Comp. v. Continental Casualty Co., 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1969) (White, J., concurring) (Arbitrators are not

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by attorney/arbitrator of insurance company made arbitration proceeding basically unfair and biased.)

held to standard of judges; it is often because they are men of affairs that they are effective adjudicators.) This consideration is even stronger in circumstances such as those presented to the committee, in which each side is directed to appoint an arbitrator and a third arbitrator is chosen by the first two. Although all the arbitrators must avoid impropriety and direct bias, there is no ethical requirement that the arbitrators chosen by one or the other of the parties to the dispute be complete strangers to the legal issues involved. Indeed, in many situations the expectation is to the contrary. Courts which have been asked to resolve the issue presented to the Committee today have recognized the practical realities of this situation. In Society for Good Will to Retarded Children v. Carey. 466 F.Supp. 722 (E.D.N.Y. 1979), for example, the court declined to disqualify an attorney representing mentally retarded clients in litigation before the court. The alleged "conflict" was that the attorney had also been appointed by the court to serve on a review panel responsible for implementing a consent decree for similarly situated clients at a different institution. In denying the motion for disqualification the court held that no ethical impropriety had occurred and took judicial notice that arbitrators may properly serve even if they have previously expressed opinions or represented clients in related matters.

> The closest analogy to Mr. Schnep's role in the Willowbrook case is that of an adversary representative on a tri-partite arbitration panel. No one expects neutrality from such a person. No one imagines that a lawyer in that position will refrain from representing similar clients in other litigations. It is a matter of common professional knowledge that lawyers associated with employers or union members, for example, sit on such panels and then litigate against each others clients. Fed. R. Ev. Rule 201.
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> In "tri-partite arbitration ... each party's arbitrator 'is not individually expected to be neutral.'" Matter of Astoria Medical Group (Health Ins.), 11 N.Y. 2d 128, 134, 227 N.Y.2d 401, 405, 182 N.E.2d 85, 87 (1962) (Fuld, J.). Cf., e.g., 9 U.S.C. § 10(b); N.Y. CPLR § 7511(b)(1)(ii). All that is required is that the arbitrator's possible bias through connections with the appointing authority be revealed.

466 F.Supp, supra, at 728.

This is not to suggest that an arbitrator selected by one or the other party to the arbitration has no ethical obligations. To the contrary,

> The fact that party selected arbitrators are not expected to be 'neutral', however, does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest and good faith manner. The New York Court of Appeals expanded on the ethical obligations of party-appointed arbitrators stating:
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> > Partisan he may be, but not dishonest. Like all arbitrators, the arbitrator selected by a party must (unless the requirement is waived) take the prescribed oath that he will "faithfully and fairly ... hear and examine the matters in controversy and ... make a just award according to the best of [his] understanding." And, if either one of the party-appointed arbitrators fails to act in accordance with such oath, the award may be attacked on the ground that it is the product of "evident partiality or corruption." Such an attack, however, must be based on something overt, some misconduct on the part of an arbitrator, and not simply on his interest in the subject matter of the controversy or his relationship to the party who selected him.

Metropolitan Property and Casualty v. J.C. Penney Casualty, 780 F.Supp. 885, 892 (D.Conn. 1991), quoting Astoria Medical Group v. Health Insurance Plan of Greater New York, 11 N.Y.2d 128, 227 N.Y.S. 2nd 401, 407; 182 N.E.2d 85, 89 (N.Y. Court of Appeals 1962) (citations and italics omitted).

This distinction is recognized even in the Alaska Rules of Professional Conduct. Rule 1.12 prohibits a former judge or arbitrator from representing anyone in connection "with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk... ." A specific exception exists, however, in that "an arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party." A.R.P.C. 1.12 (d).

In summary, an attorney acting as arbitrator must be willing and able to hear the evidence presented and to make decisions based on that evidence free of specific bias or prejudice toward the parties or the facts. An arbitrator who is aware of circumstances or relationships which raise questions about the ability to be fair and impartial should notify the parties. If the arbitrator in good faith believes that he or she cannot meet the standard of fairness required of all members of an arbitration panel, the arbitrator should refuse to serve. An arbitrator is not automatically disqualified from serving merely because the arbitrator has knowledge, experience or opinions in the relevant field, and specifically, is not automatically disqualified because he or she represents clients in similar but unrelated matters.

CONCLUSION

For these reasons, and given the facts outlined to the Committee there is nothing inherently unethical about an attorney serving as an arbitrator under the circumstances outlined.[2]

Approved by the Alaska Bar Association Ethics Committee on September 5, 1996.

Adopted by the Board of Governors on October 18, 1996.

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[2] The Committee takes no stand as to whether an arbitrator under the circumstances outlined in this opinion qualifies as an "impartial" or "neutral" arbitrator under the provisions of an insurance contract. That issue raises matters of contract interpretation and law which are appropriately addressed elsewhere.