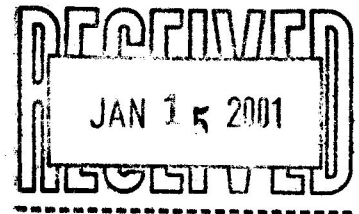


JUDICIAL ETHICS COMMITTEE
Advisory Opinion No. 01-2
Issued: January 11, 2001



Issue: Does the Maine Code of Judicial Conduct prohibit a judge from participating in a family-run business of selling Christmas trees?

Discussion: The Committee concludes that a judge may engage in that business activity, subject to the conditions and limitations set out in the Code.

Canon 4D(3) of the Maine Code of Judicial Conduct provides:

A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

- (a) a business closely held by the judge or members of the judge's family;

From this provision, it is apparent that the Code creates a very broad restriction on financial activities of judges. However, the Code also creates a narrow exception that applies here and permits the judge to participate actively in his family's seasonal business.

Consideration of Canon 4D(3) is merely the first step in the analysis of this issue, however. The provision itself, combined with the associated commentary, makes clear that other limitations may be triggered by the judge's involvement in the business. See also MAINE JUDICIAL ETHICS COMMITTEE Opinion 97-1 (June 26, 1997) (noting that conduct, although expressly permitted by one provision of the Code, may be prohibited by another provision). Those limitations expressly germane to a judge's financial activities are found in Canon 4D(1)(a) and (b). Those provisions establish a prohibition against financial and business dealings that "may reasonably be perceived to exploit the judge's judicial position," and those that "involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves." We are advised that the signage and other advertising for the judge's family

business will not refer to the judge's position on the court, and that neither the judge nor other participants in the business will otherwise create an appearance that the judge is seeking personal gain from judicial office. This approach would avoid the problems addressed in Canon 4D(1)(a). With respect to Canon 4D(1)(b), the judge and the family members involved in the business would be expected to exercise care in avoiding "frequent transactions or continuing business relationships" with persons who are likely to appear in the judge's court.

Finally, the committee is satisfied that the seasonal, low-key nature of the business operation, as envisioned by the inquiring judge, will not violate the basic principle that a judge's conduct at all times must "promote[] public confidence in the integrity and impartiality of the judiciary." See MAINE JUDICIAL ETHICS COMMITTEE Opinion 97-1 (June 26, 1997).

Therefore, we conclude that the judge may participate in the family-run business operation because the judge's participation is expressly permitted by Canon 4D(1) and because it is not prohibited by any other pertinent provision of the Code.

We reach this conclusion, mindful that it may be seen as running at odds with other principles embodied in the Code and with at least one prior opinion, MAINE JUDICIAL ETHICS COMMITTEE Opinion 97-3 (October 14, 1997), in which we examined the Code's prohibition against a judge's participation in charitable fund-raising activities. The purposes of the Code's restrictions on a judge's business and financial activities (including fund-raising) are "to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification." Advisory Committee's Notes to Canon 4D (quoting ABA Model Code 1990, Commentary to Section 4D(1)). See also Advisory Committee's Notes to Canon 4C(3)(b)(i) (prohibiting a judge's participation in public or private fund-raising "because of 'the danger that the person solicited will feel obligated to respond favorably to the soliciter if the soliciter is in a position of influence or control.'") (quoting ABA Model Code 1990, Commentary to Section 4C(3)(b)); MAINE JUDICIAL

ETHICS COMMITTEE Opinion 97-3. See generally JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS §§ 7.14, 9.06 (3d ed. 2000).

This purpose, however, is compromised if the judge is not prohibited from participating in a family-run business. As commentators have noted,

there is no difference at all between closely held family businesses and other operations. Indeed, the risk of favor-trading or favor-seeking would seem to be even greater when the judge . . . is the sole proprietor of a business. . . . If active involvement in a business is subtly or apparently corrosive, which is otherwise the clear judgment of the Code, then it would seem that the principle ought to apply with equal force to closely held family businesses, not to mention sole proprietorships.

SHAMAN, supra, at § 7.17. Indeed, Maine's original Code of Judicial Conduct did not include the family-run business provision at issue here, see Code of Judicial Conduct Canon 4C (found in Me. Rptr., 313-19, at XLII-XLIII), and the 1972 ABA Model Code of Judicial Conduct required that judges who were involved in family-run businesses take steps to extricate from the operations upon the effective date of the Code.

Canon 4D(3) of the Maine Code, which became effective on September 1, 1993, mirrors the comparable provision of the 1992 ABA Model Code of Judicial Conduct. See generally Introductory Advisory Committee's Note to Maine Code of Judicial Conduct. Maine thus became one of "relatively few jurisdictions" to have adopted this particular section; the majority of jurisdictions retained the "general 'no business'" rule because of the problems noted above. SHAMAN, supra, at § 7.17. The commentary associated with this provision of the Maine Code explains that the family-run business exception was included because under another provision of the Code, judges are permitted to engage in the active management of personal and family investments. See Maine Code of Judicial Conduct Canon 4D(2). Due to the practical difficulty in distinguishing activity permitted under Canon 4D(2) and participation in a family-run business, the drafters of the Maine Code concluded that the latter should not be proscribed, subject to the limitations applicable to any business and financial activity specified in Canon 4D(1). Further, although not

expressly noted by in the commentary to the Maine Code, "[t]he evident purpose of this provision [permitting participation in family-run businesses] is to ease judges' financial burdens." SHAMAN, *supra*, at § 7.17. See also Steven Lubet, Regulation of Judges' Business and Financial Activities, 37 EMORY LAW JOURNAL 1, 24 (1988) ("The drafters of the Code considered the family business exception to be 'an equitable and rational point at which to draw the line' between those business ventures that could be continued and those that had to be terminated."). For these express and apparent purposes, the Maine Code differs from comparable regulations adopted in other jurisdictions, by permitting the type of business activity proposed here.

The committee does not offer this discussion of Canon 4D(3) as an indirect suggestion that this provision be re-examined and modified. Cf. Amendment of Administrative Order Establishing Judicial Ethics Committee, Docket No. SJC-112, ¶ 3B (November 15, 1993) (authorizing the committee to recommend amendments to the Code). Indeed, we regard the adoption of this Canon as the product of a careful examination and balancing of the competing considerations identified in this opinion. Rather, judges' decisions regarding their participation in business and financial activities are sometimes not easy ones due to the significant restrictions imposed by the Code and the important reasons supporting those provisions. For this reason, the background of Maine's Canon 4D(3) and the different approaches taken by other jurisdictions are presented here to assist judges in making those decisions.