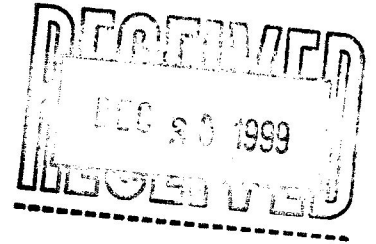


JUDICIAL ETHICS COMMITTEE  
Advisory Opinion No. 99-3  
Issued: December 28, 1999



Issue: An insurance company that provides health coverage to all state employees, including state judges, is in litigation with past or present state employees. That litigation involves coverage, claims on the policy and other matters relating to the health insurance policy. Does the Maine Code of Judicial Conduct disqualify a judge from that proceeding because the insurer who is party to that action also provides health insurance to that judge as part of that judge's employment with the state?

Discussion: As posed, this inquiry can be addressed only in a general manner. Even if disqualification is not required in the abstract, there may well be circumstances where a particular judge has reason to believe that he or she cannot act with complete impartiality; in that circumstance (such as where the judge has an actual bias in favor of or against any party to the action), that judge must recuse under Canon 3E(1). Similarly, there may be unique circumstances where the individual judge's impartiality might reasonably be questioned<sup>1</sup>; there, the judge may either recuse under Canon 3E(2), or disclose such circumstances under Canon 3E(3) and then entertain a motion to recuse under the former provision. This opinion does not address the fact-intensive issues that might arise from the circumstances of a particular judge. Rather, this opinion considers only whether all Maine judges are disqualified from proceedings where the judges' health insurance company is a litigant to an action involving that coverage.

Canon 3E(1) requires a judge to recuse from a proceeding, either with or without motion, where "the judge's impartiality might reasonably be

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<sup>1</sup> Among others, these circumstances might include the pendency of a claim submitted by the judge to the carrier similar to the one at issue in the pending action, or past dealings by the judge with the carrier that have some connection to the pending claim. No such individualized circumstances are described in the present inquiry, and the Committee does not address their impact on the disqualification issue under Canon 3E(2).

questioned. . . ." The Code goes on to describe four sets of circumstances where such disqualification might be required. While that enumerated list is not exclusive, *see* Advisory Committee's Note to Canon 3, it sheds light on the nature of the threshold necessary to trigger the possibility of disqualification. *See* Judicial Ethics Committee Advisory Opinion 91-1. Those circumstances include the existence of personal bias concerning a party or counsel or prior participation by the judge as an attorney in the pending matter. They also include the situation where the judge is a "material witness" to the matter in litigation and where the judge, or a family member residing with the judge, has an economic or other interest that is more than *de minimis*.. Thus, while these circumstances do not exhaustively identify cases in which the judge's impartiality might reasonably be questioned, they demonstrate that the connection between the judge and the case (or participants in the case) must be more than attenuated. This observation is fortified by Maine authority that addresses recusal issues. *See, e.g., State v. Lewis*, 1998 ME 83, ¶ 3, 711 A.2d 119, 121 (Me. 1998) ("Recusal is a matter within the broad discretion of the trial judge. . . ;" the Law Court will review the record on appeal to determine if appellant has demonstrated that judge was improperly influenced by extra-judicial factors); *Estate of Honora P. Tingley*, 610 A.2d 266, 267 (Me. 1992). *See also State v. Rameau*, 685 A.2d 761, 763 (Me. 1996) (record did not establish that the trial judge harbored a "deep-seated antagonism rendering a fair judgment impossible").<sup>2</sup>

Prior opinions issued by this committee point to other examples where Canon 3E(2) does not require disqualification: a proceeding where a party has filed a lawsuit or disciplinary complaint against the judge, or where the judge has filed a disciplinary complaint against an attorney of record, *see* Judicial Ethics Advisory

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<sup>2</sup>Constitutional notions of due process operate to disqualify a judge where the case "is one 'which would offer a possible temptation to the average. . . judge to. . . lead him not to hold the balance nice, clear and true.'" *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 34 L.Ed.2d 267 (1972). Put another way, a court cannot act as "a judge in his own case." *In re Murchison*, 349 U.S. 133, 136, 99 L.Ed.2d 942 (1955). The Supreme Court, however, has made clear that these constitutional standards may be augmented with "more rigorous standards for judicial disqualification" through federal and state laws and rules. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 837, 89 L.Ed.2d 823 (1986).

Committee Opinion 91-1; a proceeding where the Attorney General's office appears as counsel, and the judge's spouse is an assistant attorney general, with supervisory responsibilities, in a division whose work is unrelated to the action, *see* Judicial Ethics Advisory Committee Opinion 91-2; a criminal proceeding prosecuted by the office where the judge's brother-in-law is an assistant district attorney, *see* Judicial Ethics Advisory Committee Opinion 93-3; and a proceeding where the judge's spouse, an attorney, briefly represented the spouse of an injured party in connection with an unrelated post-injury matter, *see* Judicial Ethics Advisory Committee Opinion 96-2.

On the other hand, the committee concluded that disqualification *may* be required under Canon 3E(2) in a case where a private school was a litigant and the judge served as a trustee and member of the executive committee of the school, unless the judge's interest in the case were less than a *de minimis* one, *see* Judicial Ethics Advisory Committee Opinion 92-1; in a case where a party is a client of the judge's spouse, even though the spouse does not appear as counsel in the pending action, *see* Judicial Ethics Advisory Committee Opinion 93-2; and a criminal proceeding prosecuted by the office where the judge's brother-in-law is the district attorney, *see* Judicial Ethics Advisory Committee Opinion 93-3.

When the issue is framed within the provisions of the canons and this interpretive background, we conclude that the judge's connections to the insurance company do not, by themselves, raise a reasonable question of that judge's capacity to impartially adjudicate the carrier's rights or liabilities. As with all other state employees, each Maine judge receives health care insurance through the carrier, and the judge does not select among a choice of carriers. Further, while the judge (as with all other state employees) may make some choices of dependent coverage provided by the company, those options are standardized. Thus, the relationship between an insured and the carrier is not one where the judge might be seen as exploiting the judicial office -- because it is difficult to see how the judge could do so. *See generally* Canon 2A. Further, because the judge's medical coverage with the

company is governed by the fixed terms of the health insurance policy, the judge's actions and rulings in the proceeding cannot reasonably be seen as less than partial.<sup>3</sup>

We note some precedent for the conclusion that a judge is not disqualified from a proceeding where the outcome may have some impact on the judge's future circumstances. In *Dufresne v. Board of Trustees of the Maine State Retirement System*, 428 A.2d 412 (Me. 1981), both the Superior Court and the Law Court entertained the merits of a claim pursued by the former Chief Justice of the State of Maine (then serving as an active retired judge) regarding life insurance benefits received by ARJs under the state retirement system. In effect, the trial and appellate courts ruled on a matter that would foreseeably have direct application to them if any of those justices assumed an active retired status. The issue of disqualification was not raised or addressed in the Law Court's opinion. However, the issue litigated there involved a much more direct and foreseeable connection to the presiding justices than the one at issue here and did not result in the disqualification of the adjudicating courts.

An alternative analysis leads to the same conclusion that disqualification is not warranted here. Canon 3E(4) permits a judge, who otherwise would be required to recuse, to preside over a proceeding "if no other judge or court is available and disqualification will result in a failure of justice." If, as a general matter, the Code precludes *any* state court judge from presiding over a claim involving that judge's state designated health insurance carrier, then the litigants to those claims clearly will suffer a failure of justice. Obviously, *someone* will be required to act as a trial

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<sup>3</sup>As we point out in note 1, however, if the judge has a pending claim for benefits under the terms of the health insurance policy, and if the judge's claim bears similarities to the one involved in the pending litigation, then there may exist an argument that the judge is disqualified under Canon 3E(2) generally and Canon 3E(2)(c) particularly (disqualification warranted where the judge or a household family member has an economic interest or more than a *de minimum* interest of some other type in the outcome of the case). The merits of that issue are not reached or addressed here.

court, and potentially as an appellate judge as well.<sup>4</sup> Thus, even if disqualification is required under Canon 3E(2) , as a general matter Canon 3E(4) nonetheless permits a judge to preside over the case.

For these reasons, we conclude that, as a general matter, the Code does not disqualify a judge from a proceeding in which the health insurance carrier that provides coverage to the judge as a term of employment appears as a party.

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<sup>4</sup>Alternative procedures under the Maine Rules of Evidence, such as a reference under M.R.Civ.P. \_\_ to a person who is not a state employee and is not insured by the carrier appearing as a party, would not be availing, because ultimately a judge must review and consider the merits of the referee's decision.