

STATE OF NEW HAMPSHIRE
SUPREME COURT
ADVISORY COMMITTEE ON JUDICIAL ETHICS

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QUESTION AND FACTS PRESENTED:

A part-time district court judge continues representing a community mental health center following appointment to the judiciary. Representation is limited to corporate matters and appearances before state administrative agencies. The judge has never represented the center in any state district court. The mental health center performs some services in the judge's jurisdiction, including psychological screening, evaluation, and psychotherapy. The judge's court makes frequent mental health referrals to the health center, especially in juvenile cases, and approves payments to the center. The judge requests advice on whether disqualification is necessary in cases involving the services of personnel from the center.

DISCUSSION AND APPLICATION OF CODE OF CONDUCT:

Canon 2 of the Code of Judicial Conduct generally requires a judge to "avoid impropriety and the appearance of impropriety" in all endeavors. Canon 3 of the Code of Judicial Conduct further requires a judge to perform duties impartially. Canon 3E mandates self-disqualification when "the judge's impartiality might reasonably be questioned...." The perspective for assessing reasonableness is not that of the judge, but a "disinterested person fully informed of the facts...." Canon 3E, Comment. See also Blaisdell v. City of Rochester, 135 N.H. 589, 593 (1992). The purposes of the ethical requirement and third party standard are to insure unbiased judicial decisions and promote "public confidence" in the integrity of the judicial system. Id. The committee believes that a reasonable and informed person could conclude that actual or apparent bias is possible where an organization-client of the judge takes court assignments for compensation in one of the judge's cases. For example, a reasonable person might wonder whether the judge overly credited the professional assessments of its client's staff in order to maintain a good relationship with the client and obtain future legal business. A party whose interests were adversely affected by such a professional assessment also might reasonably question the fairness of the judge's decisions and lose confidence in the judicial process.

If the judge believes that decisions in such a case will not be affected in a partisan manner by the lawyer-client relationship with the mental health center, the judge may ask the parties to consider waiving the self-imposed disqualification. Canon 3F. If so, the lawyers and parties should consider remittal of disqualification out of the presence of the judge, and any agreement of remittal should be entered into the record. Canon 3F.

It is not generally improper for the judge requesting advice to continue representing the mental health center simply because disqualification may be required in a particular case involving center staff. In rendering its advisory opinion, the committee recognizes that New Hampshire is one of few states that employ part-time judges. This arrangement should preserve opportunities for part-time judges to make an adequate living while carrying out their judicial duties. Otherwise, the state could not attract excellent candidates to its part-time judiciary. The New Hampshire Code of Judicial Conduct accordingly permits part-time judges to engage in a broad array of activities that are forbidden to full-time judges. For example, Section C(2) of the Application of the Code of Judicial Conduct provides that a part-time judge may continue to practice law. A part-time judge may also serve as counsel to a town within the jurisdiction of the judge's court. Section(C)(3). Questions of judicial ethics involving part-time judges thus must be approached with realism and flexibility. We recognize the valuable role that the part-time judiciary plays in conserving state resources and providing expert service. At the same time, the integrity of the judicial system must not be compromised, nor the public confidence treated lightly. Impartiality goes to the heart of judicial integrity and public confidence, and thus the ethical rules on disqualification for part-time judges should not bend to pragmatism.

ADVISORY OPINION ON THE QUESTION PRESENTED:

The Code of Judicial Conduct requires disqualification of a part-time judge who represents a mental health center in cases before that judge that involve the services of the mental health center staff. If the judge believes that decisions in such a case will not be affected by the relationship with the health center client, the judge may ask the parties to consider waiving disqualification in compliance with the procedural requirements for remittal set forth in the Code of Judicial Conduct.

THIS ADVISORY OPINION IS ISSUED BY CONCURRENCE OF FOUR COMMITTEE MEMBERS. ONE MEMBER DISSENTED.

Reed Elizabeth Loder, Member

CAUTIONARY STATEMENT

This opinion is advisory only and not binding on the judicial conduct committee, which may, in its discretion, consider compliance with an advisory opinion by the requesting individual as a good faith effort to comply with the Code of Judicial Conduct. Rule 38-A(4)(c).

MEMBER FREDERIC K. UPTON, DISSENTING:

I respectfully dissent.

The Code of Judicial Conduct clearly requires part-time judges to observe the same rules governing disqualification (Canon 3E) and avoidance of impropriety and its appearance (Canon 2) as apply to full-time judges. So, here, while the part-time judge may continue to perform legal services for the mental health organization as described (cf. Application of the Code, Section C (1) (b)), the judge, when sitting in district court, must consider whether self-disqualification is in order in matters affecting the client-organization. It is here that I part company with the majority. My colleagues have opined that blanket across-the-board disqualification of the part-time judge is mandated by the Code in any and all matters involving the client-organization, taking the position that the judge's impartiality might reasonably be questioned by a disinterested and informed third person in all such cases. In my opinion, such an application of the Code is excessive and out of proportion, and unnecessarily impinges on a private gainful activity in which the part-time judge is allowed to engage. I very much doubt that a reasonable, informed and objective third person would or might invariably question the impartiality of the judge.

I concede that in making referrals to the mental health organization, or in considering its reports and evaluating the testimony of its witnesses, or in approving its invoices, the judge is placed in a position of some delicacy and must be scrupulously careful to avoid giving rise to an appearance of favoritism or self-interest. I would address the problem by simply requiring the judge, whenever acting in a matter affecting the mental health organization, to make a complete disclosure on the record of the legal services that he performs for the organization. Such a disclosure should be made even though the judge believes disqualification is not warranted.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Commentary to Canon 3E(1). Such disclosure should operate to avoid any loss or diminishment of public confidence in the courts that might otherwise result. Cf. Blaisdell v. City of Rochester, 135 N.H. 589 (1992). If, upon such disclosure, a party objects to the judge's participation, the judge must carefully consider whether to step down, applying a third party and not a personal standard.

If, in any case involving the client-mental health organization, the judge concludes that he or she is disqualified, the judge may seek remittal of the disqualification in accordance with the Code's remittal procedure. Canon 3F.

Frederic K. Upton, Member