

THE STATE OF NEW HAMPSHIRE
Belknap Superior Court
64 Court Street
Laconia, NH 03246
603 524-3570

NOTICE OF DECISION

KRISTIN M YASENKA ESQ
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09-E-0148 Georgia Tuttle MD, et al v. NH Medical Malpractice, et al

Enclosed please find a copy of the Court's Order dated 6/25/2009
relative to:

Order-Plf's Motion to Disqualify
Order-Def's Motion to Disqualify

06/25/2009

Dana Zucker
Clerk of Court

cc: KEVIN M FITZGERALD ESQUIRE
GORDON J. MACDONALD ESQ
W. SCOTT O'CONNELL ESQ
ANNE M EDWARDS, ESQ.

STATE OF NEW HAMPSHIRE

BELKNAP COUNTY

SUPERIOR COURT

GEORGIA TUTTLE, M.D., ET AL

v.

NEW HAMPSHIRE MEDICAL MALPRACTICE JOINT UNDERWRITING
ASSOCIATION, ET AL

Docket No.: 09-E-148

**ORDER ON PETITIONERS' MOTION TO DISQUALIFY (ATTORNEY
GENERAL FROM REPRESENTING JOINT UNDERWRITING
ASSOCIATION, ASSISTANT ATTORNEY GENERAL PERLOW
FROM REPRESENTING ANY PARTY)**

Citing New Hampshire Rules of Professional Conduct 1.7 and 3.7, Petitioners move to disqualify the Attorney General's Office from representing respondent New Hampshire Medical Malpractice Joint Underwriting Association ("JUA") or its board members and to disqualify Assistant Attorney General Glenn Perlow from representing any party in this matter. Petitioners have submitted proposed findings of fact and rulings of law, all of which the Court has granted and makes part of this order for the purpose of deciding the disqualification issues only. For the reasons contained in the rulings on the petitioners' requests and the narrative of this order, Petitioners' motion to disqualify the office of the Attorney General from representing the JUA is GRANTED and the motion to disqualify Assistant Attorney General Perlow is DENIED.

Petitioners, Georgia Tuttle, M.D., LRGHealthcare, and Derry Medical Center, in their own right and on behalf of those similarly situated as current or

past policyholders in the New Hampshire Medical Malpractice Joint Underwriting Association (the "JUA") move to disqualify the office of the Attorney General from representing the JUA or its board members "because such representation is necessarily in conflict with related representation and advice provided to the Department of Insurance." Petitioners cite New Hampshire Rule of Professional Conduct 1.7(a), which provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest occurs where "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client...." N.H. Rules of Professional Conduct 1.7(a).

Petitioners argue that the JUA has contractual, regulatory, and fiduciary duties to its policyholders which obviously conflict with the commissioner's position that he will not approve a distribution of excess surplus to JUA policyholders and the Insurance Department's concurrence with House Bill 2, which would transfer the excess \$110 million at issue in this case from the JUA to the general fund for State use.

The Attorney General's office objects, arguing that "the JUA is not an entity legally separate and distinct from New Hampshire State government, but rather part of the government, created at the discretion of and supervised by the Insurance Commissioner pursuant to the authority vested in him by statute (RSA chapter 402-C). The JUA board members and the board administrator are therefore officials of the State of New Hampshire Insurance Department." The

Court disagrees with the Attorney General's characterization of the JUA and its board members and finds that the petitioners have met their burden of proof by clear and convincing evidence that a conflict exists between the Department of Insurance and the JUA preventing both of them from being represented by the Attorney General's office.

The JUA is a quasi-public/private entity established in 1975 pursuant to RSA chapter 404-C to provide access to professional liability insurance coverage to medical providers in this state. It is a "mandatory risk sharing plan" established by the commissioner upon a finding, after hearing, that medical malpractice insurance was "not readily available in the voluntary market." RSA 404-C:1. The commissioner promulgated rules to govern the JUA. Id. Currently, the JUA insures approximately 30 percent of medical care providers in this state and competes with two private medical malpractice insurers which provide coverage to the majority of medical care givers. (Representation by Attorney General's office at June 23, 2009 hearing.)

The rules governing the JUA set forth the duties and obligations both of the commissioner and the JUA board, its members and chairman. The board has full authority over the operation of the JUA as follows:

- a. "The commissioner shall grant the board the authority to exercise all reasonable or necessary powers relating to the operation of the association, " Ins 1703.04 (l);

- b. "The board shall retain such staff and appoint such committees as are reasonable and appropriate to carry out the operations of the association," Ins 1703.04(o);
- c. The establishment of a bank account for use by the servicing carrier to pay claims and related expenses, Ins 1703.05(e);
- d. The levying of assessments on association members, Ins 1703.07(a);
- e. The repayment to members of premiums written on association business collected in excess of the amounts necessary to pay losses and expenses, Ins 1703.07(c);
- f. The management of a stabilization reserve fund, Ins 1703.09(a), including the retention of staff "reasonable and appropriate" to carry out the operations of the trust, Ins 1703.09(g);
- g. The determination of coverage and forms, Ins 1703.11(a); and
- h. Responsibility for financial management, budgets and reporting to the association management, Ins 1703.12.

Additionally, the chairman of the JUA signs Part I, Terms and Conditions of each medical malpractice policy. Part II, Endorsements, is co-signed by an authorized representative of the JUA. (Verified Emergency Petition for Extraordinary Writ of Mandamus and Writ of Prohibition, Exhibit 1.) The commissioner takes no part in negotiating or executing these individual liability contracts.

Given the quasi-private/public and voluntary nature of the JUA; the lack of any State funding to implement or support the JUA; the fact that the Department

does not guarantee coverage to policyholders if the JUA were unable to do so; and the broad powers and responsibilities of the JUA board, the Court concludes that the JUA is a separate entity from the Insurance Department and is not part of the executive branch of State government. Rather, it is akin to the New Hampshire Retirement System which the New Hampshire Supreme Court has held is “an independent entity rather than an executive department or agency.” State Retirement System v Sununu, 126 N.H. 104, 108 (1985). Although the statute establishing the State retirement system, RSA chapter 100-A, is silent as to the status of the retirement system, the Supreme Court cited three reasons for concluding that it was an independent entity: (1) the “full power” given by statute to the retirement system’s board of trustees; (2) the fiduciary obligations that the trustees owe the system’s members and beneficiaries; and (3) the long-standing practice by the retirement system of autonomy in its contractual dealing.

The Attorney General’s office attempts to distinguish State Retirement System mainly on the basis that the retirement system was created by statute whereas the JUA was established by rules promulgated by the commissioner and approved by the legislature. This is a distinction without a difference. The commissioner’s power to create the JUA was given by statute. The resultant entity is similar to the retirement system as discussed above. Moreover, that RSA chapter 100-A specifically states that the trustees of the retirement system have a fiduciary duty to members and beneficiaries, while the rules establishing the JUA do not, is of no practical import. The JUA has contractual and regulatory obligations, which have the same effect. See, e.g., Ins. 1703.7(c) (JUA is

authorized to “repay () to members ... premiums written on association business collected in excess of the amounts necessary to pay losses and expenses.”).

That the JUA is an entity apart from the government is also supported by the fact that the JUA has been represented by private counsel, not the Attorney General’s office, in cases where it has been a party or filed an amicus brief in the New Hampshire Supreme Court. See Concord Hospital v New Hampshire Medical Malpractice Joint Underwriting Association, 142 N.H. 59 (1997), Concord Hospital v New Hampshire Medical Malpractice Joint Underwriting Association, 137 N.H. 680 (1993), and New Hampshire Insurance Guaranty Association v Elliot Hospital, 154 N.H. 571 (2006).

For these reasons, the Court finds that the Attorney General’s simultaneous representation of both the JUA and the Insurance Department creates a conflict under New Hampshire Rule of Professional Conduct 1.7(a).

Petitioners also seek to disqualify Attorney Perlow because, as the author of the legal memorandum upon which the commissioner relied in supporting House Bill 2, Perlow may be called as a witness. For the reasons stated in the Attorney General’s objection, the Court does not find that Attorney Perlow must or should be disqualified. Moreover, the Court assumes that the reasoning contained in the Perlow memo may well be the foundation upon which the respondents will rely in opposing the petitioners. How Attorney Perlow arrived at his conclusions will not be relevant to the Court in analyzing the correctness of that position.

