The Justices of the new Supreme Court and the Judges of the Superior Court who were in judicial office at the time of the adoption of the Constitution of 1947 continued to hold office for the period of their respective terms which remained unexpired on that date and were eligible for tenure upon reappointment. Judge Lloyd was not a Circuit Court Judge at the time of the adoption of the Constitution. He was not therefore in the class of judges who automatically constituted the Judges of the new Superior Court. He was not serving a term on November 4, 1947; the constitutional provision that incumbent judges serve out the periods of their terms which remained unexpired at the time the Constitution was adopted had no applicability to Judge Lloyd.

In my opinion, Judge Lloyd has no tenure either under Article VI, Section VI, Paragraph 3 or Article XI, Section IV, Paragraph 1 of the Constitution of 1947.

Respectfully,

GROVER C. RICHMAN, JR.
Attorney General

GCR:F:K

JANUARY 23, 1956

HONORABLE CARL HOLDERMAN
Commissioner of Labor and Industry
1035 Parkway Avenue
Trenton, New Jersey

FORMAL OPINION, 1956—No. 4

DEAR COMMISSIONER HOLDERMAN:

You have requested our opinion as to whether there is a conflict of interest between a physician's status as an insurance company examiner and as a medical examiner in the Division of Workmen's Compensation.

Your supplemental letter sets forth the following illustrative case:

> "Mr. A is injured in a plant and is referred to Dr B, who is retained by the insurance company, for examination as to the extent of his injuries. Dr. B later during informal proceedings in our Workmen's Compensation court, acting as a State employed Medical Examiner, examines Mr. A and recommends to the Referee who is presiding at the hearing, his diagnosis as to the extent of Mr. A's injuries."

Under the facts which you present, we are of the opinion that the interests of the state and the interests of insurance companies who insure respondents in workmen's compensation cases are conflicting. A state medical examiner in the Division of Workmen's Compensation who also examines workmen's compensation claimants on behalf of insurance companies has breached his duty of undivided loyalty to the state and may be subject to disciplinary action.

Faithful service is required by every employee.

> "The law implies an agreement on the part of the servant or employee

to faithfully serve and be regardful of the interest of his employer during the term of his service." 35 Am. Jur. 82.

If a state employee engages in outside employment, he must take care that he does nothing which will conflict with the state's interest or impede the effective performance of his official duties. See: Attorney General's Memorandum Opinion to Commissioner Palmer dated February 1, 1955; 56 C.J.S. 70; note 13 A.L.R. 909.

Informal hearings are held by the Division of Workman's Compensation in accordance with Section I of its rules. Rules No. 2 and 3 provide as follows:

"The State doctor shall examine the claimant and report his opinion of the extent of disability to the Referee for his consideration.

On the date of an informal hearing, the claimant or employer shall, on demand of the Referee, present to the State doctor at the time and place of the hearing, the report or reports of the attending physician or physicians, including x-rays, reports of x-rays and laboratory tests."

It thus appears that the state medical examiner has the duty to report impartially to the Referee to aid in the Referee's determination. Previous participation by him in the same case in the role of an insurance company examiner would seriously affect his ability to form an independent and impartial judgment. Even if he were to disqualify himself in every case in which he has previously acted, his ability to perform his duties properly would be impeded by being retained by an insurance company writing workmen's compensation insurance.

As to formal hearings, Rule 22 prohibits a state medical examiner from testifying for either side. This rule recognizes the impropriety of a doctor's participating on behalf or one of the litigants. The policy underlying a similar rule formerly in effect has been the subject of judicial comment in two cases.

In *Harrison* v. *Garlitti,* 120 N.J.L. 64, 65 (Sup. Ct. 1938) it was said,

"The effect of such a rule should be to keep the testimony and conclusions of such witnesses entirely impartial. If doctors, paid by the state to assist in the just administration of this important bureau, may be retained by either side in a contested case, they would soon come to be at least under the suspicion of leaning towards the side paying for their services. Public policy would seem to demand such a rule, and so we find no error here."

In *Frisby* v. *Good Humor Corp.,* (not offically reported) 17 N.J. Misc. 277, 278 (Com. Pl. Essex Co. 1939) the court discussed the case of *Harrison* v. *Garlitti,* supra, saying

"But this case, as its opinion clearly indicates applied to far different facts, i.e., in forbidding state doctors to 'be retained by either side' for the obvious reason that they would then 'soon come to be at least under the suspicion of leaning toward the side paying for their services.' Obviously, the Supreme Court reads the rule as applicable to the facts before it, i.e., the preferred testimony of the state doctor as an expert opinion witness, whose opinion might well be swayed by his retention as an expert and the payment for his services. For this swayed testimony to come in fact from the lips of

one occupying the influential position of a state doctor, would clearly be against 'public policy.' But by the same token, the Supreme Court did not hold this rule to apply to a mere fact witness, as here. * * *"

Both opinions indicate the judicial attitude toward the retention of state doctors by litigants or insurers. It is clearly against public policy.

In *Latorre's case,* 302 Mass. 24, 18 N.E. 2d 357 (Sup. Ct. Mass. 1938) a physician who had made an x-ray examination of an employee at the request of the employee's physician was held not to qualify as impartial and thus not competent to serve as one of three industrial disease referees in a hearing where the employee examined by him was the claimant. At 18 N.E. 2d 358 the court said,

"Such a circumstance was utterly inconsistent with the requirements of plain justice and the demands of a full and fair hearing of an important issue of fact. * * * It may be that the physician was constant in his belief that the employee had the disease in question and that he was not conscious of any bias or prejudice; but one occupying a position, the duties of which in some respects resemble judicial functions, must avoid even the appearances of partiality or interest."

It is generally recognized that an expert who has been engaged by one of the litigants to a controversy does not possess complete objectivity. Samuel R. Gerber, M.D. in an article entitled *Expert Medical Testimony and the Medical Expert* appearing in *Physician in the Court Room,* (Western Reserve U. Press, 1954) at page 65 says:

"Under modern court procedures there are two factors which tend to thwart full and completely objective testimony by the expert witness. One factor is that at the present time in this country each litigant engages one or more experts to support his side of the question and to attempt to impress the judge and jury with the correctness of his stand, disregarding objectivity. If the expert were chosen by the court or a commission were set up for the purpose, it would obviate the natural feeling that the expert is, one might say, on one team. Such sentiment often leads to an unconscious bias or mental block on the part of the expert who dislikes to 'let down' the side who engaged him. * * *"

The importance of impartiality and objectivity on the part of medical examiners whose function it is to advise workmen's compensation officials has been discussed in Yerion, *Expert Medical Testimony in Compensation Cases,* 2 Law and Contemporary Problems 476 (1935). At page 487 the author comments as follows:

". . . In solving any problem connected with the administration of justice, there must be competent and honest officials to administer the law; and where compensation officials are the agents in securing impartial testimony, they must always be on the alert to keep off the list of impartial examiners those whose practice is derived in the main either from the insurance companies or from compensation claimants. While this may seem to be a large order, it is not impossible of accomplishment even under the existing systems of procedure. Where this is done and where sufficient power and funds are granted to obtain disinterested medical testimony when needed, most of the evils popularly associated with expert medical testimony will be overcome or greatly lessened. * * *"

For the foregoing reasons we advise you that the engagement or association of state medical examiners with insurance companies or affiliates of companies which write workmen's compensation insurance should be prohibited. This may be accomplished by regulation. It need not be a part of the rules of practice before the agency but could be a part of the internal regulations of the division.

Yours very truly,

GROVER C. RICHMAN, JR.
Attorney General

By: JOHN F. CRANE
Deputy Attorney General

JFC:jeb

MARCH 15, 1956

HON. FREDERICK J. GASSERT, JR.
Director, Division of Motor Vehicles
State House
Trenton, New Jersey

FORMAL OPINION, 1956—No. 5

DEAR DIRECTOR GASSERT:

You have advised us that:

"Ever since license plates have been manufactured at the State Prison, it has been the practice of the Motor Vehicle Division to advise the State Use Industries in the Department of Institutions and Agencies well in advance of the Motor Vehicle Division's requirements for new plates or inserts. Many months ago we advised the State Use Industries that we would want a new general issue of plates, the first supply of which were to be available in June of 1956. Already, 110,000 sets of these plates have been manufactured. The ordering of the dies, of the material and paint for the plates was all made by the State Use Industries through the Division of Purchase and Property.

"The Appropriations Committee on Thursday last questioned the legality of this procedure noting that the appropriation request to pay for these plates was in the budget for the fiscal year 1956-1957."

You have requested an opinion whether or not this procedure is in any way illegal or not in conformity with the existing statutes.

It is our opinion that you have correctly conformed with the proper statutory procedure and that your actions were legal and proper.

R.S. 30:4-92 to 100, originally adopted in 1918 (P.L. 1918, c. 147, Secs. 701-709), provides a comprehensive scheme by which institutional labor may be employed to manufacture products that can be used by various State agencies. This program is under the supervision of the State Board of Control of the Department of Institutions and Agencies, which through its State Use Division has in previous years manufactured license plates which are required by the provisions of Title 39 to be displayed by every motor vehicle registered in this State.

R.S. 30:4-95 states that:

"The several state and county institutions and noninstitutional agencies,