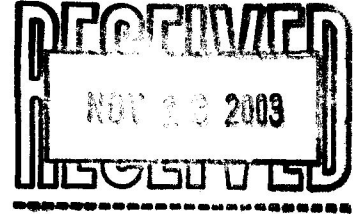


JUDICIAL ETHICS COMMITTEE  
Advisory Opinion 03-3  
Issued: November 6, 2003



**Issue**

What are the responsibilities of a Probate Judge who receives information that indicates that the personal representative of an estate has improperly diverted estate assets to his own use?

**Statement of Facts**

A probate judge has received information in the course of pending probate proceedings that the personal representative of an estate has improperly diverted assets of the estate to his own use. In response to various motions and orders seeking that an accounting be filed and that the assets of the estate be distributed, counsel for the personal representative has acknowledged that estate assets had been appropriated by the personal representative and informed the court of the personal representative's intention to reimburse the estate within 60 days. The 60 days have passed, no reimbursement has been paid, and one of the devisees of the estate has now filed a motion for contempt against the personal representative.

**Discussion**

The inquiry made to the Committee seeks guidance on whether Canon 3(D) is applicable. Canon 3(D)(1) relates to a judge's obligation to report potential violations of the Code of Judicial Conduct. Canon 3(D)(2) relates to a judge's

obligation to report potential violations of the Maine Bar Rules. Canon 3(D) does not speak to the issue of reporting potential criminal violations by parties before the court to the appropriate law enforcement authorities.<sup>1</sup>

In the committee's view, however, if there is a substantial likelihood that a crime has been committed, Canon 2(A) would support a judge's decision to report the relevant information to law enforcement authorities. This is particularly true in a case where the criminal wrongdoing in question relates to a matter over which the court has supervisory authority.

Canon 2(A) provides

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

It can certainly be argued that a judge's failure to bring substantial evidence of a personal representative's theft from an estate to the attention of law enforcement would not promote public confidence in the judiciary.

The remaining questions raised relate to whether the judge should defer any report until all hearings in the judge's court have been concluded and whether, if a

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<sup>1</sup> Since neither Canon 3(D)(1) nor 3(D)(2) are applicable, the immunity provided by Canon 3(D)(3) is also inapplicable. As a result, whether the judge could be held liable for reporting potential criminal wrongdoing to the prosecuting authorities would depend, *inter alia*, on the doctrine of judicial immunity and (if judicial immunity were found not to apply) would depend on the privilege that is accorded to persons who communicate information to law enforcement so long as they have probable cause and do not act with knowledge that the charge is false or in reckless disregard of whether or not the charge is false.

report is made by the judge, the judge should thereafter recuse himself or herself from any further participation in the case.

There is nothing in the Canons that requires that a report be delayed. Moreover, recusal would only be required if the judge were to conclude that he or she could no longer act with complete impartiality. *See* Canon 3(E)(1). The fact that a judge has become aware of information suggesting criminal wrongdoing by a party and has acted on that information by reporting it to law enforcement authorities does not itself require recusal. As the Law Court stated in *Estate of Dineen*, 1998 ME 268, ¶ 9, 721 A.2d 185, 188:

[I]nformation gained or opinions formed by a trial judge based on events or facts presented in the same or other judicial proceedings do not constitute a basis for recusal except in the extraordinary circumstances that demonstrate a deep-seated favoritism or antagonism that would make fair judgment impossible.

(internal quotation omitted).

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Roger Putnam, Esq. did not participate in the drafting of this opinion.