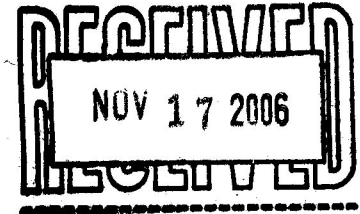


JUDICIAL ETHICS COMMITTEE
Advisory Opinion 06-1
Issued: November 10, 2006



Issue

May a Maine Probate Judge act as Counsel to a candidate for the Maine Legislature in a recount to determine the person to be certified as the person elected in the last general election to the Maine House of Representatives.

Statement of Facts

The inquiring Judge has been asked to act as Counsel to a candidate for the Maine Legislature in a recount proceeding to be initially determinative of the apparent winner in the election in Maine House District #94.

The Code

Canon 5 of the Maine Code of Judicial Conduct is set forth in full as Exhibit A.

II. General provisions of Code of Judicial Conduct are set forth in full as Exhibit B.

Under Part II, section 1B(1) of the Code of Judicial Conduct, probate judges are entitled to practice law, are excused from Canon 4C(1) except as to matters pending in their court, and are excused entirely from Canon 5A(1)(b).

Discussion

In view of the above, the Committee does not believe that the Judge will be involved in "other political activity" within the meaning of Canon 5A(1)(f) by representing a candidate in the proposed legislative recount.

The inquiring Judge of Probate in this instance will be acting as Counsel for his prospective client in the ongoing legislative recount.

It is likewise clear that this legal representation cannot come before the Judge of Probate in his judicial capacity or before any other judicial body.

The Maine Constitution Art. 4, Pt. 3, §3 provides as follows:

“Each House shall be the judge of the elections and qualifications of its own members, and a majority shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as each House shall provide.”

Thus, the exclusive judges of who shall be the winning candidate in District #94 lie in the hands of the Maine House of Representatives.

Conclusion

The inquiring Judge of Probate, acting as legal Counsel in behalf of a legislative candidate, is not prohibited from acting as such by the Maine Code of Judicial Conduct.

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CANON 5

A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity**A. Political Conduct of Incumbent Judges.****(1) A judge shall not:**

(a) act as a leader or hold an office in a political organization;

(b) publicly endorse or publicly oppose a candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings;

(e) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions; or

(f) engage in any other political activity except as authorized under any other section of this Code or on behalf of measures to improve the law, the legal system, or the administration of justice.

(2) A judge who is a candidate for reappointment, or for appointment to another judicial or non-judicial office, shall also comply with the provisions of section B of this Canon.

(3) A judge shall resign from judicial office upon becoming a candidate for any elective office, except that a judge of probate may be a candidate for reelection while holding that office, provided that the judge complies with the provisions of section C of this Canon.

B. Political Conduct of Candidates Seeking Appointment to Judicial Office.

A candidate for appointment to judicial office:

(1) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary.

(2) shall not:

(a) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(b) make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; or

(c) knowingly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

C. Political Conduct of Candidates for Election as Judge of Probate.

(1) A candidate for election or reelection as judge of probate shall comply with the applicable provisions of subsection A(1) and the provisions of section B of this Canon, except as provided in subsections C(2)-(4) of this Canon.

(2) A candidate for election or reelection as judge of probate may, while a candidate,

(a) speak to gatherings on his or her own behalf;

(b) appear in newspaper, television and other media advertisements supporting his or her candidacy;

(c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and

(d) publicly endorse or publicly oppose any candidate for public office.

(3) A candidate for election or reelection as judge of probate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(4) Except as prohibited by law, a candidate for election or reelection as judge of probate may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.

D. Applicability. A successful candidate, whether or not an incumbent, or an unsuccessful candidate who is an incumbent, is subject to judicial discipline for conduct in the course of seeking appointment or election that violates the provisions of this Canon 5; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for conduct in the course of seeking appointment or election that violates the provisions of this Canon 5. A lawyer who is a candidate for judicial office is subject to Maine Bar Rule 3.2(c).

PART II. GENERAL PROVISIONS

SECTION 1. APPLICABILITY

A. **In General.** Every justice, judge, active retired justice, and active retired judge of the Supreme Judicial, Superior, District, and Administrative courts shall comply with all provisions of this Code. Every judge of probate shall comply with this Code except as provided in subsection B(1) below.

B. **Judges of Probate.** A judge of probate

(1) is not required to comply

(a) except while serving as a judge, or as to matters pending in the judge's court, with Canons 3B(9) and 4C(1); and

(b) at any time with Canons 4D(3), 4E(1), 4F, 4G, 4H, and 5A(1)(a)-(d).

(2) shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

C. **Candidates for Judicial Office.** This Code is applicable to candidates for judicial office in accordance with Canon 5D, provided that a successful candidate for judicial office shall comply with all provisions of this Code between the time of confirmation of appointment or certification of election and swearing in.

SECTION 2. EFFECTIVE DATE;
TIME FOR COMPLIANCE

This Code takes effect on September 1, 1993. All persons to whom this Code is applicable on that date, and all persons to whom this Code thereafter becomes applicable, shall comply immediately with all provisions of this Code except Canons 2C, 4D(1), 4D(3), and 4E and should comply with those provisions as soon as reasonably possible and shall do so in any event within the period of one year.

SECTION 3. DEFINITIONS

A. **Appropriate Authority.** "Appropriate authority" denotes an authority with responsibility for initiation of disciplinary process with respect to the violation to be reported.

B. **Candidate.** A candidate is a person seeking appointment, reappointment, election, or reelection to public office. A person becomes a candidate for appointment or reappointment to office when the nominating or appointing authority either requests a formal submission of credentials by the person or announces that the person is under consideration or has been nominated for office. A person becomes a candidate for election or reelection to public office as soon as he or she makes a public announcement of candidacy, files nomination papers, or authorizes solicitation or acceptance of contributions or support.

C. **Court Personnel.** "Court personnel" denotes employees of the Judicial Department or the several counties while engaged in support of a judge in the performance of judicial duties, but does not include the lawyers in a proceeding before a judge.

D. **De Minimis.** "De minimis" denotes an interest too trivial to raise reasonable question as to a judge's impartiality.

E. **Economic Interest.** "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active participant in any organization as permitted by Canon 4C(3); or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

F. **Election.** This term includes primary, general, and special elections.

G. **Fiduciary.** "Fiduciary" includes such relationships as personal representative, executor, administrator, trustee, and guardian.

H. **Honorarium.** "Honorarium" denotes a payment of money or any thing of value for an appearance, speech, or article, not including reimbursement or payment for actual and necessary expenses for travel, food, and lodging incident upon an appearance or speech.

I. **Income.** "Income" includes but is not limited to compensation for services rendered (other than

amounts paid by the state of Maine for performance of judicial duties), dividends, interest, rent, royalties, capital gains, and amounts received from a trade or business, trust, estate, pension (other than amounts paid under a plan administered by a state or by the federal government), or other financial arrangement. "Income" does not include honoraria, gifts, bequests, favors, reimbursement or payment of expenses, or payments of alimony, child support, or separate maintenance.

J. Knowingly, Knowledge, Known, or Knows. "Knowingly," "knowledge," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

K. Law. "Law" denotes court rules as well as statutes, administrative rules and regulations, constitutional provisions, and decisional law.

L. Member of the Judge's Family. "Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative by blood or marriage or a person with whom the judge maintains a close personal relationship.

M. Nonpublic Information. "Nonpublic information" denotes information that is made confidential or is impounded by law or court order.

N. Political Organization. "Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to public office.

O. Require. The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons while they are subject to the judge's direction and control.

P. Third Degree of Relationship. The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

SECTION 4. TITLE

This Code may be known and cited as the Maine Code of Judicial Conduct.