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JUL 5 RECD

June 29, 1994

Professor Merle W. Loper  
University of Maine School of Law  
246 Deering Avenue  
Portland, ME 04102

RE: Judicial Ethics Committee  
Advisory Opinion #94-2

Dear Professor Loper:

I have been advised by Sandy Lamothe that you like to receive the Judicial Ethics Committee's advisory opinions.

Accordingly, I am enclosing a copy of Advisory Opinion #94-2.

It is my understanding that Sandy was forwarding directly to you Advisory Opinion #94-1.

Sincerely,

JUDICIAL ETHICS COMMITTEE



Nicholas P. Brountas  
Chair

NPB/slh

encs.

JUDICIAL ETHICS COMMITTEE

**Question:** Judge J presided over a divorce trial in which one of the contested issues concerned the primary physical residence of the parties' minor child. Following entry of judgment, Party P filed a appeal which was ultimately denied by the Law Court. Party P also filed a complaint against Judge J with the Committee on Judicial Responsibility and Disability. This complaint related to allegations of Judge J's conduct during the course of the divorce hearing, and it was dismissed by the Committee on the ground that it was unsupported by sufficient information to establish a claim for judicial misconduct.

After these proceedings, Party P became involved in an organization relating to domestic relations matters. Both the organization and Party P individually have made public statements critical of several individuals, including Judge J. These statements relate to the competence of the legal system and its participants in resolving custody-type issues. Judge J was unaware of these public comments until they were brought to his attention in a motion to recuse.

In addition to these circumstances, Party P's current spouse approached Judge J in a public setting and essentially accused the latter of "stealing" a child from his parents.

Post-judgment motions have been filed in the original divorce proceeding. Party P has moved for the recusal of Judge J. Is recusal required?

**Answer and discussion:** Canons 3E(1) and (2) of the present Code of Judicial Conduct require the recusal of a judge when that judge "has reason to believe that he or she could not act with complete impartiality" or, if a party moves for recusal, when "the judge's impartiality might reasonably be questioned...." The Advisory Committee Notes to these provisions confirm that the former inquiry is a subjective one (that is, relating to the prospective judge's state of mind), while the latter inquiry is objective (that is, relating to the reasonable perceptions of the surrounding circumstances, irrespective of the judge's actual state of mind).

Judge J must first decide as a subjective matter under Canon 3E(1) whether the conduct of Party P and others acting on that person's behalf, combined with the other circumstances of that case, foreclose that judge's ability to act with complete impartiality. This Committee recognizes the legitimate concern that mandatory recusal in these circumstances may simply encourage disgruntled

parties to engage in conduct (during or after a hearing) designed to achieve that recusal. Nonetheless, regardless of a party's motivations and purposes, that party's conduct may create in the judge an actual bias or prejudice against him or her. In light of this, after a careful reflection on the nature and effects of that party's conduct, if a judge subjectively entertains doubts about his or her ability to act in a fully impartial manner, then disqualification is required.

If disqualification is not required under Canon 3E(1), then recusal under Canon 3E(2) must next be considered. The Committee concludes that the circumstances presented here do not require recusal under this latter provision.

In Opinion 91-1, this Committee expressed the opinion that under both the present Code of Judicial Conduct and its predecessor, recusal is not required pursuant to Canon 3E(2) where, in a pending case, a party has filed a suit against the judge or a complaint against that judge with the Committee on Judicial Responsibility and Disability. In that opinion, it was specifically noted:

It would seem that if the pro se suit or complaint against the judge was so spurious or meritless on its fact that anyone could immediately see that the suit or complaint was ridiculous, then it would seem that the judge's impartiality could not be questioned. Also, if it is so obvious from the face of the suit or complaint that the party is filing it solely for the purpose of removing the judge from the primary case, then it would not seem that the judge's impartiality could be questioned.

also Advisory Committee Notes to Canon 3E(2) ("When a party to a pending proceeding sues or files a disciplinary complaint against the judge, paragraph (a) does not require disqualification if the circumstances indicate that the suit or complaint has been brought solely as a tactic to obtain the judge's disqualification.").

Here, both the appeal to the Law Court and the administrative complaint were rejected. The subject matter of one or both of these proceedings forms part of the basis for the current motion to recuse: Party P has claimed that Judge J's impartiality is reasonably subject to question because of the manner in which the

judge presided over earlier proceedings. The merits of that claim, however, have been addressed and rejected in several different contexts, and so that claim cannot reasonably be seen as evidence of the judge's ability to be impartial.

Further, the Committee is of the opinion that Party P's conduct (direct and indirect) of expressing an opinion of Judge J's competence and prior rulings does not rise to the level of generating a reasonable question about the judge's present and future capacity to sit impartially. As the Committee noted in Opinion 91-1, the non-exhaustive list of circumstances of mandatory disqualification found in Canon 3E(2) do not include a party's decision to file a complaint against a judge. Rather, they relate to the relationship between a judge and the subject-matter of a pending proceeding or to its participants. Under Canon 3E(2)(a), if "the judge has a personal bias or prejudice concerning a party" and if the nature or magnitude of that bias or prejudice rises to the level where the judge's impartiality toward that party might reasonably be questioned, then recusal is required. The resulting question is whether, in an objective analysis, there could reasonably be attributed to Judge J a bias against Party P that would raise questions about that judge's impartiality, even in the absence of actual bias (assuming as is discussed above that Judge J does not in fact harbor bias against Party P).

Further, recusal is not required on the sole ground that Party P had filed a disciplinary complaint against Judge J. See Opinion 91-1.

Of relevance here is the concern, noted above, that mandatory recusal in these circumstances -- regardless of the actual effect of those circumstances on the judge's capacity to sit impartially -- would simply encourage disgruntled litigants to manufacture the circumstances leading to that result. See Advisory Committee Notes to Canon 3B (stating that the disqualification provisions of the Code should be construed "'to minimize potential abuse of the disqualification alternative' by making clear 'that only bona fide disqualification will remove [from the judge] the obligation to hear and decide a matter.'"). Because of the concern of abuse, there is reason to apply the provisions of Canon 3E(2) in a conservative or restrictive manner where the request for recusal is based on the moving party's own conduct. Other provisions of the Code direct a judge to adjudicate pending matters without regard to "public interests, public clamor, or fear of criticism." Canon 3(B)(2). If a judge is unable to remain free of those types of influences in a particular matter, recusal would be required under Canon 3E(1). Otherwise, the mere existence of "public clamor" or "criticism" does not form the basis for recusal, because of the Code specifically recognizing the occasional existence of those external forces and proscribes a judge from

allowing a decision to be affected by them.

For those reasons, it is the Committee's opinion that recusal is not required under these circumstances unless a judge believes that he or she cannot act impartially under Canon 3E(1).