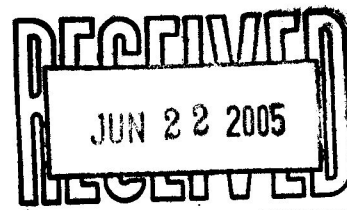


JUDICIAL ETHICS COMMITTEE

Advisory Opinion 05-1

Issued: June 17, 2005



**Issue**

May a Maine Probate Judge, who faced with various motions for recusal and who would normally recuse himself under Canon 3E(2)(a), refuse to disqualify himself pursuant to Canon 3E(5), which provides as follows:

“A judge may decline to disqualify himself or herself in any proceeding in which disqualification might otherwise be required under subsections (1) or (2) of this section, if no other judge or court is available and disqualification will result in a failure of justice. In such a case, the judge shall disclose on the record the basis for disqualification and shall thereafter disqualify himself or herself if at any time it is possible to transfer the proceeding to another judge or court without a failure of justice.”

**Statement of Facts**

The Probate Judge inquiring gives us the following facts. The 2004 election pitted four other Democrats against the present incumbent in the June 8, 2004 primary, which he won. The campaigning was heavy, the political advertisements and claims were robust, and each of the candidates filed judicial conduct complaints against one or more of the others, which were entertained by the Maine Committee on Judicial Responsibility and Disability. The elected Judge is faced from time to time with motions for recusal filed by certain of the former political opponents, by their more vocal supporters, and by attorneys who formerly worked for the Judge's private law firm and with whom the Judge is presently engaged on opposite sides in private civil litigation.

The Judge has also informed us that with regard to § 307, the Probate Court Judge in Cumberland County has directed that cases shall not be transferred to the Cumberland County Probate Court due to his heavy volume of cases. He further postulates that the Oxford County

Probate Judge is prohibited, by his allocated County budget, from accepting any transfers of contested matters from any other Probate Court. The pertinent Maine Statutes which appear to apply to this situation are attached. As we can see, the Maine Legislature has anticipated at least in some degree that a Probate Judge may well have to disqualify himself or herself under certain circumstances.

#### **Discussion**

As we read the inquiry and the request made of us, the Probate Judge would in fact disqualify himself under the various recusal motions under Canon 3E(2)(a) but for the fact, as disclosed above, that he is of the opinion that no other judge or court is available and the disqualification will result in a failure of justice. See Canon 3E(5).

It is the Committee's view that appropriate arrangements can be made under the provisions of § 306 and § 307 to assign another probate judge to hear any cases where disqualification would be required under Canon 3E(2)(a) and that it would be a violation of Canon 3E(2)(a) for a probate judge to hear such cases.

We would suggest to the Probate Judge that in our view, it would be appropriate to discuss any problems encountered in having another probate judge preside in cases where disqualification is called for with the Chief Justice of the Supreme Judicial Court, which Court has supervisory jurisdiction over all inferior courts within the State (4 M.R.S.A. § 7).

#### **Conclusion**

Under the forgoing circumstances, we believe that the Probate Judge has not exhausted all avenues to determine whether or not another judge or court is available. It is only in the most unusual and extraordinary circumstances that Canon 3E(5) should be invoked.