

MAINE STATE LEGISLATURE

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G. STEVEN ROWE
ATTORNEY GENERAL



Telephone: (207) 626-8800
TDD: (207) 626-8865

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES:

84 HARLOW ST., 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

44 OAK STREET, 4TH FLOOR
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260
FAX: (207) 822-0259
TDD: (877) 428-8800

128 SWEDEN ST., STE. 2
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

August 23, 2002

Honorable Richard A. Bennett
President
Senate of Maine
3 State House Station
Augusta, Maine 04333-0003

Dear President Bennett:

This responds to your letter of August 14, 2002, in which you raise a series of questions regarding the candidacy of James P. Dunleavy for the Maine State Senate. Mr. Dunleavy is the sitting Judge of Probate for Aroostook County. His current term ends December 2004.

Your first question asks whether Judge Dunleavy may continue to serve as Judge of Probate if he is elected to the State Senate. The answer is no. Three separate provisions of the Maine Constitution severely curtail the right of judicial officers to hold other state offices.

Article III, a separation of powers clause, provides:

- Section 1. The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial.
- Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

A second constitutional provision in Article VI specifically focuses on the Judicial Branch. It provides:

- Section 5. No justice of the Supreme Judicial Court or any other court shall hold office under the United States or any other state, nor under this State, except as as justice of the peace or as member of the Judicial Council.

Finally, Article IX, which addresses the issue of incompatibility of offices, provides:

Section 2. No person holding the office of Justice of the Supreme Judicial Court, or of any inferior court, Attorney General, district attorney, Treasurer of the State, Adjutant General, judge of probate, register of probate, register of deeds, sheriffs or their deputies, clerks of the judicial courts, shall be a member of the Legislature; and any person holding either of the foregoing offices, elected to, and accepting a seat in the Congress of the United States, shall thereby vacate said office; and no person shall be capable of holding or exercising at the same time within this State, more than one of the offices before mentioned.

These constitutional provisions make clear that a judge, including a judge of probate, may not exercise any of the powers of a legislator and may not hold office as a member of the Legislature. In all relevant respects, Attorney General Opinion No. 88-7, which was referenced in your inquiry, remains the opinion of this office.

You also asked whether Judge Dunleavy is violating Canon 5(A)(3) of the Maine Code of Judicial Conduct by continuing to serve as Judge of Probate after becoming a candidate for the State Senate; whether 4 M.R.S.A. §312 conflicts with Canon 5(A)(3) and, if so, which controls; and whether Judge Dunleavy is subject to discipline under the Maine Code of Judicial Conduct despite 4 M.R.S.A. §312. Each of these questions requires interpretation and application of Canons in the Maine Code of Judicial Conduct.

The Maine Code of Judicial Conduct was established by the Maine Supreme Judicial Court. The Canons are broad statements of the ethical duties of judges and govern the conduct of all Maine judges, including judges of probate. The Maine Supreme Judicial Court has exclusive authority to promulgate, enforce and interpret the Canons. *Mitchell v. Judicial Ethics Committee*, 2000 ME 83, ¶5, 749 A. 2d 1282, 1283.

It is not appropriate for the Attorney General to provide opinions regarding interpretation of the Canons in the Maine Code of Judicial Conduct. Title 5 M.R.S.A. §195 provides that “[t]he Attorney General shall give his written opinion upon questions of law submitted to him by the Governor, by the head of any state department or any of the state agencies or by either branch of the Legislature or any members of the Legislature on legislative matters.” Interpretation and application of the Canons in the Code of Judicial Conduct does not deal with legislative matters. Rather, it deals with judicial conduct.

The responsibility for interpreting and applying the Canons in the Code of Judicial Conduct lies exclusively with the Maine Supreme Judicial Court. That Court has held that, “[a]s the only court established by our Constitution, it is incumbent upon the Supreme Judicial Court to exercise that part of the judicial power involved in prescribing

the conduct of judges and imposing discipline upon them for misconduct." *Matter of Ross*, 428 A.2d 858, 868 (Me.1981). To assist the Supreme Judicial Court with carrying out its responsibilities, the Court established two committees. The first, the Judicial Ethics Committee, renders advisory opinions to individual judges and candidates for judicial office on matters involving the interpretation and application of the Maine Code of Judicial Conduct. The second, the Committee on Judicial Responsibility and Disability, receives and reviews complaints concerning alleged violations of the Code of Judicial Conduct. There are no restrictions on who may file a complaint with the Committee on Judicial Responsibility and Disability.

I hope this information is helpful to you. Please feel free to call upon this office if we can be of further assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "G. Steven Rowe". The signature is written in dark ink and is positioned above the typed name.

G. Steven Rowe
Attorney General

GSR/dp