

MAINE PROBATE AND TRUST LAW ADVISORY COMMISSION
Comments at LD 1766 Information Session held by
Joint Standing Committee on Judiciary
November 13, 2025

The Probate and Trust Law Advisory Commission ("PATLAC") was created by the Legislature in 2009. PATLAC has 10 members, 8 of whom are appointed by the Chief Justice of the Maine Supreme Judicial Court (one Justice of the Maine Superior Court, two Maine Probate Court Judges, and five members of the Maine State Bar Association's Trust & Estate Section), the Maine Attorney General or his/her designee, and one person appointed by the Governor to represent the interests of older people.

The statutory charge of PATLAC includes reviewing Titles 18-B and 18-C and recommending amendments to those Titles, and includes examining any other aspects of the State's probate and trust laws, including substantive, procedural and administrative matters. The subject matter of LD 1766 seems clearly to be an administrative matter falling within the scope of PATLAC's charge.

This is not a new discussion topic. There is a deep history to the topic of LD 1766 that I won't recount in full, but the entire discussion seems to flow from four distinct markers:

- 1st - Unlike the District and Superior Courts, the Probate Courts are not part of the state Judicial Branch.
- 2nd - Probate Judges are considered to be part-time, largely as a result of their modest compensation.
- 3rd - Under the Maine Code of Judicial Conduct, Probate Judges are, with limited exceptions, exempt from the prohibition against practicing law that applies to all other Judges.
- 4th - Under Article VI, Section 6 of the Maine Constitution, Probate Judges are elected rather than appointed.

In 1967, Article VI, Section 6 was conditionally repealed - - conditioned upon the Legislature establishing a Probate Court system with full-time judges. 58 years later, that has not yet happened, although it has been and continues to be promoted, currently in the form of LD 1766. LD 1766 adopts some of the proposals at the heart of the December 2021 report of the Legislatively created *Commission to Create a Plan to Incorporate the Probate Courts into the Judicial Branch*.

Last December, the Maine Supreme Judicial Court posed the following question to PATLAC:

What measures should the Court take to eliminate or at least mitigate concerns raised by the private practice of law by Maine's part-time Probate Court judges,

by changes to the Maine Code of Judicial Conduct or other sets of rules, and what recommended timeframes are appropriate for implementing or phasing in recommended changes?

What prompted the Court to present the question to PATLAC?

As noted, this is not a new issue. It was raised before the Court in *Estate of McCormick* 765 A.2d 552, 2001 ME 24 (2001). The issue of the propriety of Maine's Probate Judges practicing law was raised before the Court. One of the parties contended that his due process rights were violated by permitting a long-time, well regarded probate judge to represent the opposing party in a contested matter in one of Maine's probate courts.

According to [one of the litigants], an unfair advantage inures to the litigant represented by a judge, with a correlative disadvantage to the adverse party, when, as here, a probate judge with years of service on the bench appears as a lawyer before another probate judge who is comparatively new to the bench and who may someday appear before the advocate-judge now before him. Although we understand [the] concern, we do not believe the situation rises to the level of a constitutional due process deprivation in the circumstances of this case. The practice of allowing part-time probate judges to litigate cases as part-time lawyers has received widespread criticism. The criticism focuses on 4 M.R.S.A. § 307 (Supp.2000), which explicitly authorizes probate judges to maintain active probate practices. . . . Moreover, the principal case [relied] on, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986), recognizes that issues involving potential judicial bias or prejudice rise to a constitutional level "only in the most extreme of cases," and thus are more appropriately addressed by the policy decisions of state legislatures. *Id.* at 821-22, 106 S. Ct. 1580. The Maine Legislature has addressed this issue and has continued to allow probate judges to maintain active probate practices.

In support of its statement that the practice of allowing part-time probate judges to litigate cases as part-time lawyers has received widespread criticism, the Court included footnote #4:

See COMMISSION TO STUDY THE FUTURE OF MAINE'S COURTS, REPORT TO THE 116th LEGISLATURE 72 (Feb. 28, 1993) (recommending the appointment of four full-time probate judges and stating that the "Probate Court system in Maine has been challenged for the appearance of impropriety conveyed by the presence of part-time judges who are not restricted from practicing law in the communities in which they serve"); COMMISSION TO STUDY FAMILY MATTERS IN COURT, FINAL REPORT TO THE 112TH LEGISLATURE 10-11 (March 1986) (noting the "serious potential conflict of interest existing when part-time probate judges are also part-time practicing attorneys"); COMMITTEE ON JUDICIAL RESPONSIBILITY AND DISABILITY. ANNUAL REPORT TO THE SUPREME JUDICIAL COURT

OF THE STATE OF MAINE 21 (1984) (noting that the "practice of law by part-time probate judges ... continues to create an appearance of impropriety in many people's minds"); MAINE PROBATE LAW REVISION COMMISSION, REPORT TO THE 109th LEGISLATURE 8-10 (Feb. 21, 1980) (describing the system as "ethically uncomfortable and undesirable," and recommending that the situation be resolved by transferring probate jurisdiction to the Superior Court). One committee even recommended an outright prohibition of the practice:

This is a situation which, in the committee's view, should no longer be allowed to continue. Just as Maine has worked toward the elimination of similar kinds of unhealthy conflicts of interest in the past by eliminating the part-time municipal judge positions and the part-time nature of the former county attorney positions, so should this conflict of interest situation be eliminated in the case of our part-time probate judges.

COMMITTEE FOR THE STUDY ON COURT STRUCTURE IN RELATION TO PROBATE AND FAMILY LAW MATTERS, REPORT TO THE JUDICIAL COUNCIL 4 (Jan. 18, 1985).

To permit PATLAC to respond to the question presented to it by the Maine Supreme Judicial Court, PATLAC invited comment from 12 groups (Committee on Judicial Conduct; the Board of Overseers of the Bar; the Advisory Committee on the Rules of Professional Conduct; the Advisory Committee on Probate Procedure Rules; the Advisory Committee on Judicial Ethics; the Maine Probate Judges Association; the Maine State Bar Association's Trusts and Estates Section; the Maine State Bar Association's Elder Law Section; the County Commissioners; the Maine Registers of Probate; Legal Services for Maine Elders; and Disability Rights Maine) that we identified as interested parties, plus eight individual lawyers who had historically expressed interest in the topic. We held a Zoom forum to receive comments from those interested parties, and we met separately with the Probate Judges at their Fall Assembly last month.

Our next step is to craft our report to the Court based on what we've gleaned from our review of the issue.

There's an old adage: "For every problem, there is a solution that is simple, neat . . . and wrong." The simple and neat answer is for the Maine Supreme Judicial Court to prohibit the practice of law by Probate Judges and have them subject to the same prohibition that governs all other state court judges. The consequence of that simple and neat solution is that our Probate Judges, other than those who have already retired from the practice of law and for whom the part-time obligations of a Probate Judge work perfectly well, will resign from the bench out of financial necessity. They won't be able to financially afford to live on the modest salary they receive from the counties as a Probate Judge. As a result, Maine will find itself without Judges to conduct the business of many of our Probate Courts.

Although a temporary solution can be crafted by the Court through its rule making, a permanent resolution can only be provided legislatively and PATLAC encourage you to work with the affected stakeholder groups to identify and implement that solution.

Respectfully submitted,

David Backer, on behalf of the Probate and Trust Law Advisory Commission

- Justice Jennifer Archer,
Maine Superior Court
- Judge William Avantaggio,
Lincoln County Probate Court
- David Backer, Esq., Chair
- Barbara Carlin, Esq.
- Anya Endsley, Esq.
- Cody Hopkins, AAG
- Justin LeBlanc, Esq., Vice-Chair
- Marianna Putnam Liddell, Esq.
- Patricia A. Nelson-Reade, Esq.