RULE 63. INABILITY OF A JUDGE* TO PROCEED; RECUSAL

(a) Inability to Proceed. If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

(b) Recusal.

Recusal means the withdrawal of a judge from any involvement in a case. It is sometimes referred to as "disqualification."

(1) *On the Court's Initiative.* A judge may recuse on the judge's own initiative if the judge determines that recusal is appropriate pursuant to the Code of Judicial Conduct.

(2) *On the Motion of a Party.* A party may move for a judge to recuse if the party has a good faith basis for requesting recusal. The grounds for requesting a recusal are stated in the Code of Judicial Conduct.

(A) *Assertion of Grounds for Recusal and Affidavit Requirement.* When a party moves for a judge to recuse, the party must include in the motion an assertion of the factual grounds supporting recusal and file with the motion one or more affidavits demonstrating an evidentiary basis for those facts.

(B) *Determination of Recusal by the Court.* With or without a hearing, a judge may determine herself or himself to be recused. If the judge recuses in the matter, the judge may, but is not required to, set forth the reasons for recusing.

(C) *Denial of Motion to Recuse.* If a judge denies a motion to recuse, the judge shall briefly state the reasons for the denial in a written order, or orally

* As used in this rule, "judge" refers to a judge of the District Court, a judge of the Probate Court, a justice of the Superior Court, a justice of the Supreme Judicial Court, or a Family Law Magistrate.

on the record if the motion is made during the course of a proceeding that is being recorded, provided, however, that if a motion to recuse is made during or shortly before the start of an on-the-record proceeding, and the judge denies the motion, the judge need not state the reasons for denial of the motion until after the proceeding has been completed and the judge, or a jury, has issued any order or other ruling to conclude the proceeding.

(3) *Effect of Recusal.* Upon determining herself or himself to be recused, the judge shall not further participate in the proceeding unless her or his recusal is waived by the parties as provided in subdivision (c) below.

(c) Waiver of Recusal by the Parties.

(1) A judge who determines herself or himself to be recused may, after disclosing the basis for her or his recusal on the written or recorded record, ask the parties and their attorneys whether they wish to waive the recusal, except where the basis for recusal is as provided in paragraph (2) below. A waiver of recusal shall recite the basis for the recusal and shall be effective only when signed by all parties and their attorneys and filed in the record.

(2) There shall be no waiver of recusal if the basis therefor is any of the following:

(A) The judge has announced a personal bias or prejudice concerning a party;

(B) The judge has more than a de minimis pecuniary interest in the subject of the litigation;

(C) The judge served as an attorney in the matter in controversy; or

(D) The judge has been a material witness concerning the matter in controversy.

(3) If grounds for recusal are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the recusal is waived, recuse herself or himself, but in the absence of good cause, the rulings she or he has made up to that time shall not be set aside by the judge who replaces the recused judge.

(d) Appeal. A judicial ruling denying a motion to recuse may be appealed in the ordinary course. Such a ruling is not an immediately appealable order and may be reviewed by appeal only after the entry of a final judgment.

Advisory Note – July 2015

The purpose of this amendment is to clarify for parties to proceedings and other interested persons the process to be followed when a judge is unable to proceed or when a question of disqualification or recusal arises. Subdivision (a) is the current Rule 63, essentially unchanged. Subdivisions (b), (c), and (d) address the process to be followed when there is a question of recusal or disqualification of the judge. The standards for recusal or disqualification are set forth in the Maine Code of Judicial Conduct at Rules 2.11 and 3.11 (effective September 1, 2015). The recusal provisions of Rule 63(b), (c), and (d) are identical to the recusal provisions of Rule 25(b), (c), and (d) of the Maine Rules of Unified Criminal Procedure.

Rules 2.11 and 3.11 of the Maine Code of Judicial Conduct and the Advisory Notes to those Rules provide guidance for application of the revised Rule 63 and should be consulted when questions arise regarding disqualification and recusal issues.

Advisory Committee's Notes
1993

Rule 63 is entirely replaced to adopt a 1991 amendment of Federal Rule 63 for the purpose of maintaining conformity to the federal rule. The reasons for and intended scope of the new rule are those stated in the federal Advisory Committee Note:

> * * * * * The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings. In making provision for other circumstances, the revision is not intended to encourage judges to discontinue participation in a trial for any but compelling reasons * * * * *. Manifestly, a substitution should not be made for the personal convenience of the court, and the reasons for a substitution should be stated on the record.
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> The former rule made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts

concluded that the text of the former rule prohibited substitution of a new judge prior to the points described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge * * * * *.

The increasing length of federal trials has made it likely that the number of trials interrupted by the disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. This will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution. If there has been a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties.

The "certification" required of the successor judge may be an oral acknowledgement of familiarity made on the record. The federal Advisory Committee's Note continues:

The revised text authorizes the substitute judge to make a finding of fact at a bench trial based on evidence heard by a different judge. This may be appropriate in limited circumstances. First, if a witness has become unavailable, the testimony recorded at trial can be considered by the successor judge pursuant to F.R. Evid. [and M.R. Evid.] 804, being equivalent to a recorded deposition available for use at trial pursuant to Rule 32. For this purpose, a witness who is no longer subject to a subpoena to compel testimony at trial is unavailable. Secondly, the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed.

The court would, however, risk error to determine the credibility of a witness not seen or heard who is available to be recalled. . . .

Reporter's Notes
December 1, 1959

This rule, which closely follows Federal Rule 63, is similar to R.S.1954, Chap. 107, Sec. 51 (amended in 1959 so as to apply in criminal cases only) [later 4 M.R.S.A. § 1055, repealed in 1965 following adoption of Maine Criminal Rule 25] which permits another justice to allow exceptions in the event of the disability of the trial justice. The rule specifies that if the justice who is assigned to act for the disabled justice is satisfied that he cannot perform this duty, he may in his discretion grant a new trial. No Maine case has been found covering this situation, but the rule seems a sensible one. It would obviate at least the possibility of the result that when the trial justice was disabled and the successor was satisfied that he could not act, the aggrieved party would be without any remedy. *Cf. The Stenographer Cases,* 100 Me. 271, 61 A. 782 (1905).