

JUDICIAL ETHICS COMMITTEE



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JUDICIAL ETHICS COMMITTEE  
STATE OF VERMONT

OPINION NO. 2827-I  
July 6, 1998

Re: Service Vermont State Police Advisory Commission

Honorable

Your letter requests an advisory opinion on your own behalf and on behalf of the Governor regarding the above question. The Committee must indicate at the outset that this response is directed to you alone, as the Governor is not a requesting party cognizable under the Administrative Order instituting the Judicial Ethics Committee. The Vermont Supreme Court has authorized this Committee to render advisory opinions only at the request of: "any court in this state, or the Judicial Conduct Board, or an individual **judge, or** a candidate or potential candidate for judicial **office.**" A.O. 35. Therefore, the Committee addresses its response to you. The Committee notes that the Governor has access to advisory opinions through the Attorney General's **Office**. See, e.g., Op. Att'y Gen. No. 94-2F (**Jan.28, 1994**) legal counsel for Governor requesting opinion as to status and legal authority of gubernatorial appointee to state board who has been rejected by Senate and who is subsequently reappointed by Governor to same **office**).

As for your substantive question, a brief review of pertinent provisions of the Vermont **Code of Judicial Conduct** proves instructive. Canon 4(C)(2) of the Vermont **Code of Judicial Conduct** states in pertinent part:

A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the **law**, the **legal** system or the administration of justice.

A.O. 10, Canon 4(C)(2). The **current** version of the Code, adopted in 1994, specifically exempts assistant judges' from the operation of certain sections. A.O. 10, **Application** Section B. Although assistant judges remain subject to portions of Canon 4 dealing **with** extrajudicial activities, the above provision--explicitly barring judges from serving on governmental commissions--does not apply to assistant judges. Reporter's Notes, A.O. 10, Application. The exceptions created for continuing part-time judges strike a balance between part-time judges' participation in professional and civic activities--and preservation of **the impartiality** and integrity of the judiciary. **Id.** The exemption from Canon **4(C)(2)** consists of the first example of this balance in the **Reporter's Notes. Id.**

Despite the lack of an outright prohibition against serving on an executive commission or acting as its chairperson, other sections of the Code that do apply to assistant judges may implicitly **raise** an ethical bar to such service. For instance, the overarching principle of Canon 4 applies to Assistant Judges: "A judge **shall** so conduct the judge's extra-judicial activities as to minimize the **risk** of conflict with judicial obligations." A.O. 10, Canon 4 and Application Section B. Thus, assistant judges, like other judges,, must consider whether an extra-judicial

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<sup>1</sup> Assistant judges, along with probate judges, fall under the rubric of "continuing part-time judges" in the Vermont Code of Judicial Conduct. See A.O. 10, **Terminology [3]**. The application notes then **exclude continuing** part-time judges from several Code provisions. See **id.**, Application Section **B**.

activity will **cast** reasonable doubt on the judge's capacity to act **impartially**. See A.O. 10, Canons 3(E)(1), 4(A)(1).

Here, one might ask whether serving on the Vermont State Police **Advisory** Commission would cast such reasonable doubt on Assistant Judge ability to **impartially** assess the credibility of State of Vermont Troopers who either appear in or submit affidavits for family court proceedings. In other words, would his participation on this *particular executive* committee tip the balance noted **by** the Reporter's Notes? State troopers may be routinely engaged in relief from abuse proceedings on which Assistant Judge would be eligible to sit. Were Assistant Judge to choose the most prudent course of action, to ensure compliance with the Code, he would either decline Governor appointment to the chair position and resign his membership on the commission, or, abstain from sitting on cases in which state troopers appear. Of course, in the absence of **clear precedence**, the **question** becomes a judgment call for the Judge himself.


To aid him in his decision, however, the Code sets forth a few rules of construction of which he should be aware. First, Canon 1 provides that the Code should be construed and applied to **further** the objective of preserving the **integrity** and independence, of **the** judiciary. A.O. 10, Canon 1. An **Assistant Judge's** service on a government commission with a squarely executive function might well call the independence of the judiciary into question. This observation also implicates the interpretive guidance set forth in the Preamble:

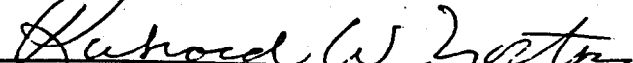
... The Canons and Sections are rules of reason. They should be applied consistent **with constitutional** requirements, statutes, **other** court rules and decisional law and in **the context** of all relevant circumstances. The Code is to be **construed so** as not to impinge on the essential independence of judges in making judicial decisions.

Hence, beyond the appearance of impartiality issue, for a member of the judicial branch to, **serve** on a commission with a clearly executive function also raises a **separation of powers** question. The issue is not new to the Vermont **judiciary**. Indeed, there is a long tradition of protecting the appearance as well as the reality of judicial independence. Perhaps the most telling example is provided by former Justice'. After his appointment to the Superior Court bench in 1965 by Governor , he sought advice on whether he should resign his long-held position as town moderator. For Judge , the position of **moderator** was particularly dear as his father had held it before him. Moreover, he felt that the very nature of the role was one of political neutrality; Nevertheless, because it was a legislative/executive role in municipal governance, the Vermont Supreme Court asked that he . . . resign the **post**.<sup>2</sup> He did.

Sincerely,


JUDICIAL ETHICS COMMITTEE

  
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Douglas Richards, Esquire, Chairman

  
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Honorable Richard W. Norton, Vice Chairman

  
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Honorable Theresa S. DiMauro

  
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Honorable George K. Belcher

  
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Douglas C. Pierson, Esquire

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<sup>2</sup> Note that the Code specifically permits assistant and probate judges to serve as town meeting moderators, subject to certain conditions. See A.O. 10, Canon 5(A)(3) and 5(C).