

JUDICIAL ETHICS COMMITTEE



(802) 828-3278

109 State Street
do Pavilion Office Building
Montpelier, Vermont 05609-07

JUDICIAL ETHICS COMMITTEE
STATE OF VERMONT

OPINION NO.2827-2
October 27, 1998

Re: Assistant Judges presiding in Judicial Bureau

Assistant Judge:

The matter and issue which you presented to the Judicial Ethics Committee has been researched, reviewed and what follows is the Opinion of the Committee and a response to your inquiry.

Question Presented:

Whether assistant judges may be disqualified **from** presiding at cases prosecuted by the county's sheriff or sheriff's deputies.

Analysis of Law:

Assistant Judges are required by statute through their county budgetary responsibilities to "provide the sheriff with an adequate bond, a suitable **office, office** equipment and supplies and adequate telephone service" as well as "equipment, supplies, insurance and funds. . . as the assistant judges consider necessary to ensure that the department operates in a safe, accountable and professional manner." 24 V.S.A. §73. Citizens of the **county** and the general public are made aware of this relationship because each year "the assistant judges shall call a meeting of the voters of the county for the purpose of presenting the proposed budget of the county for the **ensuing** year **and**

inviting discussion thereon.” 24 V.S.A. § 133.

I.

The Code of Judicial Conduct, **A.O. 10**, states that: “A judge should avoid impropriety and the **appearance of impropriety** in all of the judge’s activities.” A.O. **10**, Canon 2 (emphasis added). The Code goes on to require that judges disqualify themselves “in a proceeding in which the judge’s impartiality might reasonably be questioned.” A.O. 10, Canon **3(E)**(1). The Code then provides a list of situations that it carefully notes is not exhaustive. See **id.** (“including but not limited to”). It is important **to** note at the outset that in disqualification situations a judge is “accorded a **presumption of honesty and integrity.**” State v. Putnam, 164 Vt. 558,561 (1996). The discretion in these situations, however, rests with the administrative judge. See **id.**

The assistant judges hold budgetary authority and discretion over the county sheriff’s department. The public is made aware of this relationship through the public **budgetary meetings** that must be held annually. Vermont’s Code of Judicial Conduct is derived **from** the American Bar Association’s Model Code of Judicial Conduct of 1990. Reporter’s Notes, A.O. 10. The reporter for ABA Model Code has written that “any circumstance that would lead a reasonable person to question a judge’s impartiality is a basis for disqualification of that judge.” E. Thode, Reporter’s Notes to Code of Judicial Conduct, GO-61 (1973).

It **has** been suggested that the relationship between the assistant judges and the sheriffs department is limited and is not one that involves daily supervisory authority. The issue regarding an “appearance of impropriety” is based more on how things **look** to the average person, than on the specific details of that relationship of which most in the general public are unaware. One court has said that “a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to **the** average person on the street.” Potashnick v. Port City

A Legal scholar on judicial ethics offered the following analysis:

[I]nstances of judicial preconception often are innocent in intent. Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest and decide the lawsuits before them in a just and proper way. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge than he or she may realize, with the result that the judge has little conscious knowledge of being swayed by improper influences.

J. Shaman, Judicial Conflict of Interest, 3 Geo. J. Legal Ethics 245,246 (1989).

This could be said of any judge. Note, however, that the author goes on to state that:

[E]ven if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that casts disrepute upon the judiciary.

Id. Despite whatever specifics of the assistant judge's relationship with the sheriffs department, the appearance, or perception, to the common person, of this relationship raises the specter of partiality, whether or not this partiality actually exists. It is **unquestioned** that **the assistant** judges are vested with budgetary authority over the sheriffs department. See 24 V.S.A. § 73. This relationship alone, whether or not it manifests itself in daily contact and direction, is a supervisory one in that the sheriffs department must look to the assistant judges for funding. This could readily raise questions in an ordinary person's mind regarding the appearance of impropriety and partiality.

II.

Vermont's Code of Judicial Conduct requires that judges disqualify themselves if they have "an economic interest . . . in a party to the proceeding." A.O. 10, Canon 3 (E)(1)(c). "Economic interest" is defined as "a relationship as an officer, director, advisor or other active participant in the affairs of a party." A.O. 10, Terminology (6). The assistant judges act in this capacity as regards the sheriffs department. They set the budget, much as an officer or director of any other type of

organization might. The origin, source, or level of discretion involved in this function is not relevant to this issue, the mere existence of this budgetary function makes disqualification per ~~se~~ **necessary** under Canon 3.

The Vermont Supreme Court has noted that although “‘per se’ rules are generally inappropriate in judicial disqualification issues . . . The Code contains detailed per se disqualification rules for circumstances where we have decided that disqualification is always required.” Putnam, 164 Vt. At 56 1. These disqualifications “always required” circumstances are outlined in Canon 3 (E) (1) and the existence of “economic interest” is included in this list.

The definition of “economic interest” and its interpretation by the courts of various jurisdictions has primarily focused on business and investment situations. The type of situation in which assistant judges and sheriffs departments interact on budgetary matters is one that is unique to Vermont. Indeed the entire institution and existence of assistant judges is not found anywhere else in this country. The relationship between assistant judges and sheriffs departments do involve an “economic interest” as the budget is a basic matter upon which the assistant judge has the role of “officer, director, advisor or other active participant in the affairs of the party.” A.O. 10, Terminology (6). This role is sufficient to make per se disqualification a necessity.

Conclusion:

The relationship between the assistant judges and the sheriffs department, however limited, is one which raises a problem with the “appearance of impropriety” and impartiality as perceived by the ordinary individual. The assistant judges’ role in setting the budget for the sheriffs department puts them in the position of one with an “economic interest”* in the affairs of the sheriff’s department. The existence of an “economic interest” makes necessary the per se disqualification of assistant judges **from** presiding at cases prosecuted by the county’s sheriff or sheriffs deputies,


under the Code of Judicial Conduct, Canon 3.

Dated at Springfield, in the County of Windsor and State of Vermont this 27th day of

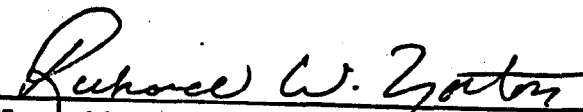
October, 1998.

Sincerely,

JUDICIAL ETHICS COMMITTEE




Douglas Richards, Esquire, Chairman



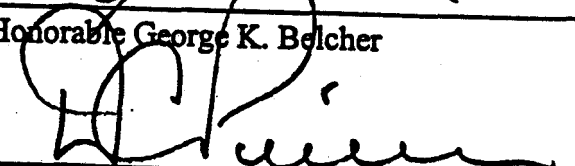
Honorable Richard W. Norton, Vice Chairman



Honorable Theresa S. DiMauro



Honorable George K. Belcher



Douglas C. Pierson, Esquire