

Judicial Ethics Committee  
State of Vermont

Opinion Number: 2728-17

Date: April 30, 2015

To: (Name Redacted)

The matter that you presented to the Judicial Ethics Committee has been researched and reviewed. The following is the Opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

*Question Presented*

You question whether it would be proper for a probate judge to accept an appointment to serve on a State council or commission such as the Vermont Rail Council, the Transportation Board, or the Vermont Advisory Council on Historic Preservation. Specifically, the question is whether it is proper for a probate judge to simultaneously serve in the executive branch as a gubernatorial appointee subject to the executive code of ethics in addition to the judiciary.

*Short Answer*

The question here presents some similarities to the questions presented in several previous Vermont Judicial Ethics Committee Advisory Opinions, primarily Opinion No. 2827-1 and 2827-7. The conclusion of the Committee here echoes portions of those opinions, although some further discussion is necessary.

The Vermont Code of Judicial Conduct, A.O. 10, does not specifically prohibit a probate judge from accepting an appointment by the Governor to serve on an executive commission.<sup>1</sup> Probate judges are exempt from the restrictions on extra-judicial activities imposed by Canon 4(C). However, careful attention should be given to the ethical constraints imposed by the Code to ensure that the probate judge's service on the commission does not diminish the judge's impartiality or appearance thereof, and the judge must disqualify him or herself from any matter that could cause a risk of conflict. Further, the interest in maintaining an independent judiciary could counsel against service on an executive commission. Although extra-judicial service on an executive commission may not violate the traditional doctrine of separation of powers, when a probate judge is also accountable to the executive, his or her independence as a judge in some circumstances may at least appear to be compromised. The nature of a probate judge's judicial role and the apparently narrow focus of the commissions proposed in this case, however, may well allow the judge to maintain an effective separation of roles, avoiding the reality or appearance that any obligations as a commissioner could influence judicial duties.

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<sup>1</sup>The term "commission" includes any executive council, board, committee, commission, or other advisory agency created by the executive.

Ultimately, a probate judge is not categorically barred from accepting an appointment. If an appointment is accepted, the judge must maintain an effective separation between the role of commissioner and judge, and must continually assess whether his or her activities scrupulously conform to Canons 1, 2, and 4(A) of the Code of Judicial Conduct.

#### *Relevant Cations*

CANON 1. A Judge Shall Uphold the Integrity and Independence of the Judiciary.

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

CANON 4. A Judge Shall so Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict With Judicial Obligations.

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra judicial activities so that they do not:

- (1) Cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) Demean the judicial office; or
- (3) Interfere with the proper performance of judicial duties.

#### *Analysis*

As this Committee explained in Opinion No. 2827-1, there is no outright bar to a probate judge serving on an executive commission because probate judges are exempt from the restrictions on extra-judicial activities imposed by Canon 4(C).<sup>2</sup> See Vermont Advisory Opinion

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<sup>2</sup>Application Section 13 applies to all continuing part time judges. A probate judge is a continuing part time judge. See A.O. 10, Terminology (3).



No. 2827-7 (Dec. 17, 2003); A.O. 10, Application Section B. As the Reporter's Note to Application Section B discusses, the "[the exceptions] strike a balance between participation by the part-time judge in the professional and civic life of the community and preservation of the impartiality and integrity of the judiciary." A.O. 10, Application Section B, Reporter's Note. However, although participation is not barred outright, the remaining ethical provisions of the Code, primarily Canon 4(A), impose some applicable ethical limitations. See A.O. 10, Canons 1, 2, and 4(A); see also Vermont Advisory Opinion No. 2827-1 (July 6, 1998) (explaining that although an assistant judge was not categorically barred from serving on Vermont State Police Advisory Council, "other sections of the Code that do apply to assistant judges may implicitly raise an ethical bar to such service"). Furthermore, concerns about separation of powers and judicial independence may counsel against accepting an appointment to an executive commission.

As a result, the question presented here is best addressed in two parts. First, this opinion addresses the restrictions imposed by Canon 4(A) on a probate judge's service on an executive commission: whether such service could raise a conflict of interest or otherwise challenge the judge's impartiality and ability to carry out judicial duties. Second, and not wholly unrelated to the first, is the question of whether the proposed dual service violates the principle of separation of powers or compromises the independence of the judiciary.

#### *Impartiality and Conflict of Interest*

Canon 4(A) makes clear that a probate judge must avoid extra-judicial activities that question the judge's impartiality or that could result in a conflict with judicial activities. See A.O. 10, Canon 4(A). Thus, a probate judge must continually "examine their participation in any government commission based on how it might affect their impartiality and ability to perform the judicial role." See Vermont Advisory Opinion No. 2728-12 at 88 (Nov. 30, 2004). As a previous ethics opinion stated:

A judge participating on a commission may appear to endorse one position over another or risk becoming too familiar with parties that appear regularly before that judge. Thus, whatever expertise a judge may offer to a commission may be offset by embroiling commission members in debates or partisan struggles that compromise impartiality in the public eye. Commissions also, by their non-judicial nature, may threaten to entangle judges in legislative or executive affairs that impugn the judiciary's independence.

Opinion No. 2728-12 at 84.<sup>3</sup> Therefore, if the probate judge's service on a commission will lead to significant conflicts with his or her duties, or cast reasonable doubt on his or her ability to act impartially, the judge's service is likely improper.

However, service on the Vermont Rail Council, the Transportation Board, or the Vermont Advisory Council on Historic Preservation may not present conflicts of interest or cast reasonable doubt on the judge's ability to act impartially. Ultimately, it will be a judgment call for the probate judge. See Opinion No. 2827-1 at 22 ("[In] the absence of clear precedence, the

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<sup>3</sup>Opinion No. 2728-12 was dealing with a full time judge's participation in a governmental commission. Though some of the concerns are similar, the analysis is not identical to this case.

question becomes a judgment call for the Judge himself.").

If an appointment is accepted, however, the probate judge must continually self-assess whether participation on the commission could cast reasonable doubt on the judge's ability to act impartially, result in impropriety, or otherwise interfere with his or her judicial duties. See A.O. 10, Canon 2, 4(A). In other words, the probate judge should continually ask: could my conduct "create in reasonable minds a perception that [my] ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." ABA Model Code of Judicial Conduct, Canon 2(A), Commentary (1990).

If a situation does arise where the probate judge's impartiality could be reasonably questioned, or where there is some other conflict of interest. Canon 3(E) requires that the judge abstain from that matter. See A.O. 10, Canon 3(E).<sup>4</sup>

### *Separation of Powers and Judicial Independence*

This Committee has not previously addressed whether a probate judge's service on an executive commission would violate the separation of powers or compromise the independence of the judiciary. Of course, "an independent and honorable judiciary is indispensable to justice in our society." A.O. 10, Canon 1. On the surface of things, simultaneous service in both branches may appear to blur their desired separateness. Unlike the United States Constitution, the Vermont Constitution explicitly recognizes the principle of separation of powers. See Vt. Const. Ch. II § 5 ("The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."). Moreover, the Code may act as a bar to such dual service if the judge's service on the commission could compromise the actual or perceived independence of the judiciary. Therefore, before accepting an appointment, the judge must consider whether service on the proposed commission would impair the "independent institutional integrity" of the judiciary. *Slate v. Pierce*, 163 Vt. 192, 195 (1995).

Generally, the principle of separation of powers seeks to prevent one branch from aggrandizing power at the expense of another. *Hunter v. Stale*, 2004 VT 108. 1121, 177 Vt. 339 (explaining that the principle of separation of powers seeks to ensure no branch of government usurps the function of another). To put it another way, "the focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so encroaches upon another branch's power as to usurp from that branch its constitutionally defined function." *In re D.L.*, 164 Vt. 223, 229 (1995). However, it has been repeatedly recognized that the absolute separation and a rigid classification of activity to one branch, is neither necessary nor feasible. See *Ti ybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 6-7 (1941). Typically, where there is no risk of encroachment or aggrandizement, absolute segregation is not necessary. See *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

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<sup>4</sup>Canon 3(F) may provide some circumstances in which it would be proper for the judge to disclose any connection he has and allow the parties to determine whether the judge must abstain. See A.O. 10, Canon 3(F). However, if the conflict is because of personal bias, Canon 3(F) is inapplicable.



It is unlikely that a probate judge's service on one of the proposed entities would cause one branch to usurp the power of another. See *In re D.L.*, 164 Vt. 223, 229 (1995). There is no apparent delegation of a judicial duty to the executive at issue and the executive presumably will not seek to restrict the power of the judiciary in any way. If such a situation were to arise, continued service would be prohibited. But generally, the fact that a single person is serving in two branches, as long as an effective separation of duties is maintained, does not violate the principle of separation of powers. See *Mistretta*, 488 U.S. 361 at 404 ("[The Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time."); see also *Slate v. Osloond*, 805 P.2d 263, 266 (Wash. Ct. App. 1991) (discussing how senator who also served as judge pro tempore did not violate the separation of powers doctrine because she did not wear two hats at the same time). Further support for this conclusion is found in the Vermont Constitution, which only prohibits certain officers from holding more than one position in government, but not probate judges.<sup>5</sup>

Nevertheless, there remains the concern about the independence of the judiciary. See Opinion No. 2827-1 at 23 ("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."). Canon 1 requires that not only actual independence, but also the appearance of judicial independence be maintained. See A.O. 10, Canon 1; see also Opinion No. 2827-1 at 23 ("There is a long tradition of protecting the appearance as well as the reality of judicial independence."). Although the court in *Osloond* did not find that a state senator who also served as a pro tempore judge violated separation of powers, the state's commission on judicial ethics found the senator's service an ethical violation because service in both the legislature and in the judiciary "could cause substantial concerns in the minds of the public as to the integrity and independence of [the judge] while serving in a judicial position and could seriously affect public confidence in the integrity and impartiality of the judiciary." See *Osloond*, 805 P.2d 263, at 267.

Though these issues may be more acute for a state senator actively engaged in politics than a Vermont probate judge, there remains the concern that pressure from the executive or policies of the commission *could* influence judicial integrity. See ABA Model Code of Judicial Conduct, Canon 1(A), Commentary (1990) ("An independent judiciary is one free of inappropriate outside influences."). As a result, at times, maintaining the appearance of the independence and integrity of the judiciary may counsel against accepting an appointment to a commission. However, in this case, the commissions appear to focus on matters generally unrelated to the judge's probate duties. It is likely possible to deal with any potential issues with careful attention and, if necessary, limited participation. See Opinion No. 2728-12 at 87 (endorsing self-limited judicial participation on a commission instead of *per se* rule prohibiting participation). This will require the effective separation of commissioner and judge roles and vigilance to ensure that there is no significant overlap of subject matter, issues, or persons addressed by the commission and those involved in judicial matters. See Opinion No. 2728-12 at 88 (discussing factors a judge should consider when determining whether to accept a position

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<sup>5</sup>The Vermont Constitution lists incompatible offices in Chapter II, § 54. There is no prohibition on a probate judge from serving in multiple branches. That the Constitution only prohibits some positions from dual service, suggests that serving in two branches is not, by itself, a violation of the principle of separation of powers.

on a governmental commission).<sup>6</sup>

Ultimately, the decision is a judgment call for the judge. If the judge accepts an appointment, he or she must continually watch for overlap between matters of the commission and judicial duties that could compromise the independence or appearance of independence of the judiciary. If such a situation arises, the judge might be able to accommodate it by abstaining from it. See A.O. 10, Canon 3(E). As additional precautionary measures, the judge should ensure that other members of the commission are aware of the judge's ethical limitations. See Opinion No. 2728-12 at 89 ("By making clear that a judge's participation is limited, workable accommodations may be made and disfavored practices possibly avoided in an ethically acceptable manner."). However, if disclosure and removal from particular matters are insufficient, then continued service on the commission would be improper. See Opinion No. 2728-12 at 88 (explaining that changed circumstances may require a judge to resign from a commission even though was proper at the start).

### *Conclusion*

The Code of Judicial Conduct and the principle of separation of powers do not categorically prohibit a probate judge from seeking appointment to an executive commission. The judge should take care to protect the appearance of impartiality and avoid compromising the independence and integrity of the judiciary. If appointment is accepted, effective separation of executive branch and judiciary roles must be maintained and the judge remains subject to the constraints of Canons 1, 2, and 4(A) as well as the remainder of the Code.

Members of the Judicial Ethics Committee



Douglas C. Pierson, Esq., Chair



Hon. Theresa S. DiMauro



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<sup>6</sup>The factors were taken from Cynthia Gray, *Ethics and Judges \* Evolving Roles Off the Bench: Serving on Governmental Commissions*, State Justice Institute, American Judicature Society, at 20 (2002). Although there the author was analyzing whether a judge could accept a position to a commission under Canon 4(C), and thus some of the factors are not be directly applicable here, many of the concerns raised have application here.