

**Judicial Ethics Committee
State of Vermont**

Opinion Number: 2728-14

Date: July 22, 2010

To: Hon. Ernest Tobias Balivet

The matter which 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

May a sitting probate judge run for election in one or more probate districts in addition to the judge's home probate district?

Short Answer

A recent decision of the Vermont Judicial Conduct Board interpreting Canon 5A(3) likely bars the contemplated conduct. The matter, however, currently is on appeal and thus has not been finally determined. Aside from Canon 5A(3), the Code does not per se bar running for and holding more than one probate judgeship. However, in some circumstances, holding more than one such position could impede the judge's ability to fulfill certain ethical duties. One contemplating simultaneous part-time judgeships should be especially sensitive to the duties to hear cases and render decisions promptly and efficiently, to diligently discharge administrative obligations, and to ensure that each position does not interfere with the proper performance of the judge's obligations in the other position.

Relevant Canons

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

A. A judge should 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.

Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

A. JUDICIAL DUTIES IN GENERAL. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.* In the performance of these duties, the following standards apply.

B. ADJUDICATIVE RESPONSIBILITIES.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

* * *

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

* * *

C. ADMINISTRATIVE RESPONSIBILITIES.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

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.

Canon 5. A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity

A. POLITICAL CONDUCT OF INCUMBENT JUDGES.

(3) A judge shall resign from judicial office upon becoming a candidate for any elective office, except that a judge of probate or an assistant judge may be a candidate for reelection or may serve as town meeting moderator, provided that the judge complies with the provisions of Section 5C.

Analysis

Though the question is framed in terms of *running* for multiple judgeships, the thrust of the issue is whether holding multiple judgeships is permissible. Running for election obviously supposes the possibility of winning. The Committee thus focuses mainly on the ethical considerations related to actually holding more than one probate judge position.

With regard to running for election, under Canon 2A of the Vermont Code of Judicial Conduct, judges should respect and comply with the law. Thus, to the extent that any election law requirements conflict with running for two positions, running for a position outside of a “home” district, or holding more than one probate position simultaneously, a judge should comply with the law.¹

In 2009, the Vermont Supreme Court ruled that Canon 5A(3) does not permit a sitting assistant judge to run for election to a selectboard. *In re Assistant Judge Calvin Colby*, 2009 VT 126 (adopting the decision of the Judicial Conduct Board). Under Canon 5A(3), a judge is required to resign from judicial office upon becoming a candidate for any elective office, except that a probate judge or an assistant judge may be a candidate for reelection or may serve as town meeting moderator, provided that the judge complies with the provisions of Canon 5C. The *Colby* decision can be read to mean that Canon 5A(3) requires a judge to resign from the judicial position before running for a non-judicial position.

Recently, the Board ruled that the plain language of Canon 5A(3) also does not permit a sitting assistant judge to run simultaneously for re-election as assistant judge and election as probate judge. *In re Assistant Judge Allen Hodgdon*, Vermont Judicial Conduct Board, Docket No. 08-057 (Dec. 29, 2009). The *Hodgdon* decision can be read to mean that Canon 5A(3) requires a judge to resign from the judicial position before running for a different judicial position.

The *Hodgdon* decision presumably would prevent any sitting judge from running for any additional judicial position, and thus presumably would foreclose a sitting probate judge from running for an additional probate judgeship. However, the *Hodgdon* decision currently is on appeal before the Vermont Supreme Court, so the matter is not yet finally decided.

Very recently, the legislature expressly authorized the conduct the Board found unethical in *Hodgdon*. House Bill 470 adds 4 V.S.A. § 278 (authorization of assistant judges), which reads as follows:

- (a) An assistant judge or a candidate for the office of assistant judge may also seek election to the office of probate judge, and, if otherwise qualified

¹ The Committee is not aware of a residency requirement that would foreclose one from holding two probate judgeships, but offers no opinion on that or any other requirement of Vermont election law. This opinion is restricted to considerations of judicial ethics apart from election law requirements.

and elected to both offices, may serve both as an assistant judge and as probate judge.

(b) In the event a probate matter arises in the superior court over which an assistant judge is also the probate judge that presides, or has presided, over the same or related probate matter in the probate court, the assistant judge shall be disqualified from hearing and deciding the probate matter in the superior court.

(c) In the event a probate matter arises in the probate court over which a probate judge is also an assistant judge that presides, or has presided, over the same or related probate matter in the superior court, the probate judge shall be disqualified from hearing and deciding the probate matter in the probate court.

Such legislation evidently was anticipated during the briefing of *Hogdgon*. In its decision, the Board suggested, but did not so rule, that such legislation, were it to materialize, may unconstitutionally usurp the Supreme Court's exclusive disciplinary authority over judges.

The sole purpose of this Committee is to render *advisory* opinions on the interpretation and application of the Vermont Code of Judicial Conduct. Administrative Order 35(3)(a). However, no opinion may be "issued on a matter that is pending before a court or the Judicial Conduct Board against a judge . . . that involves a claim of violation of the Code of Judicial Conduct by that judge . . . except on request of the court or that Board." *Id.*

The Board's interpretation of Canon 5A(3) in *Hogdgon*, which would appear to control the issue considered here, currently is before the Supreme Court. In these circumstances, this Committee declines to interpret and apply Canon 5A(3) separately here. Other Code requirements also are relevant to the issue at hand, however, and the Committee will consider them.

While the issue of holding more than one judicial position may, at first glance, appear unique to Vermont, and the Committee has found little guidance in ethics opinions elsewhere, the New York Advisory Committee on Judicial Ethics has addressed the general question several times.

In the New York committee's first reported opinion on the matter, it addressed whether a person may hold the offices of both village justice and acting city court judge, both part-time positions. New York Advisory Committee on Judicial Ethics, Opinion 91-133 (Oct. 31, 1991). The committee found that the hours of the two positions did not conflict and assumed that there would not be appeals from one court to the other. *Id.* Under New York law, a part-time judge may accept public employment that "does not conflict or interfere with the proper performance of the judge's duties." *Id.* The committee advised that a person may hold both positions and comply with ethical

obligations because there was no conflict in the time of court services and there was no incompatibility in duties.

The New York committee again addressed the issue when asked whether a part-time town justice also may hold the position of part-time city court judge. New York Advisory Committee on Judicial Ethics, Opinion 06-161 (Dec. 7, 2006). Relying on its previous decision, the committee found that a person may hold both positions “barring any conflict (e.g., scheduling, etc.) or legal impediments (e.g., residency restrictions, qualifications for office, etc.)” *Id.*

In the New York committee’s most recent opinion, the question was whether a person may hold two elected judicial positions in two separate municipalities. New York Advisory Committee on Judicial Ethics, Opinion 07-101 (Sept. 24, 2007). The person seeking the opinion was a candidate for a part-time town justice position. It was unclear, however, whether the other elected position was part-time or full-time. The committee noted that it had previously determined that a person may serve in two part-time positions. It advised, however, that it is not permissible for a full-time judge to also serve as a part-time judge. *Id.*

Canon 5A(3) aside, this Committee sees no principled reason to arrive at a different result in the circumstances presented here. One considering holding more than one part-time probate judgeship, however, should be careful to ensure that the contemplated positions will not interfere with the judge’s ethical obligations. Certain of these may be particularly affected by holding more than one judicial position at the same time.

Under Canon 3A, a judge’s judicial duties take precedence over all the judge’s other activities. These judicial duties include all the duties of the judge’s office prescribed by law. Canon 4A(3) complements Canon 3A, and applies, at least by analogy, to the circumstances presented here. Canon 4A(3) provides that a judge should conduct all the judge’s extra-judicial activities so that they do not interfere with the proper performance of judicial duties. Although probate judgeships are judicial positions, for a judge who holds two elected probate judgeships, each position should be treated as extra-judicial to the other. A judge who holds more than one judicial position accepted the added responsibility of another job.

As we recognized in Opinion #2728-13, “the Code does not advise judges to avoid all extra-judicial activities, but encourages participation within ethical bounds.” For example, a part-time probate judge may practice law privately as an extra-judicial activity. But judges still must abide by the Code—extra-judicial activities cannot be allowed to interfere with judges’ ethical obligations.

The prospect of two simultaneous judgeships raises the possibility of conflicting schedules in multiple courts. Judges are required to be on the bench on time and as scheduled. ABA Model Code of Judicial Conduct, Canon 3A (2004). “Judges violate Canon 3A and may implicate other sections of the Code, including Sections 3B(1) and

3C(1) (regulating judges' adjudicative and administrative responsibilities), when they are late for court or not on the bench when they are supposed to be." *Id.*

The possibility of unreasonably heavy caseloads should be considered. Under Canon 3B(1), judges have a duty to sit and hear cases where they are not disqualified. Furthermore, under Canon 3B(8), a judge must dispose of all judicial matters promptly, efficiently, and fairly. A heavy caseload, while not a complete defense, generally has been considered to mitigate violations of Section 3B(8). ABA Model Code of Judicial Conduct, Canon 3B(8) (2004); Jeffrey Shaman, et al., *Judicial Conduct and Ethics*, § 6.02D (4th ed. 2007). However, a heavy caseload likely would be far less mitigating, if at all, when the heavy caseload resulted from an improvident decision to hold multiple judgeships.

Under Canon 3C(1), judges must diligently discharge their administrative responsibilities and maintain professional competence in judicial administration. This section concerns the day-to-day operations of the court. Again, a heavy caseload or conflicting schedules would do little to mitigate violations of this section when those problems were caused by the judge's decision to hold multiple judgeships. To the extent that holding more than one part-time probate position interferes with adjudicative and administrative responsibilities, the judge would not be in compliance with the Code.

Generally, probate judges throughout Vermont have the same legal duties regardless of district. One probate judge presumably would not, for example, be in a position to hear appeals from decisions of any other. Thus, there does not appear to be any inherent incompatibility in holding more than one position. However, should the judge's conduct in one district somehow raise a reasonable question about the judge's impartiality in a proceeding in the other district, the judge must be diligent to recuse as the circumstances require. See Canon 3E(1).

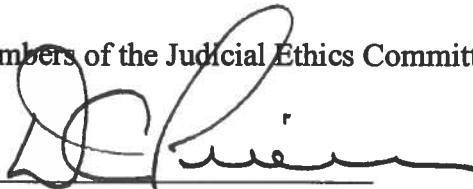
Summary

The Judicial Conduct Board's construction of Canon 5A(3) in *In re Assistant Judge Allen Hodgdon*, Vermont Judicial Conduct Board, Docket No. 08-057 (Dec. 29, 2009), if adopted by the Supreme Court as the Board decided it, likely forecloses a sitting probate judge from running for additional probate positions. Until the Vermont Supreme Court resolves that matter, a sitting probate judge considering running for an additional judgeship ought to exercise appropriate caution about whether doing so will violate Canon 5A(3).

Otherwise, the Code does not prohibit a sitting probate judge from running for an additional probate judgeship. One considering this should ensure that doing so will not create scheduling conflicts or conflict with the duties to hear cases and render decisions promptly and efficiently, to diligently discharge administrative obligations, and to ensure that each position does not interfere with the proper performance of obligations of the other position.

July 22, 2010

Members of the Judicial Ethics Committee²



Douglas C. Pierson, Esq., Chair

Hon. Theresa S. DiMauro

² Members Belcher, Dardeck, and Grearson recused themselves and did not participate in this decision.