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# VERMONT ASSOCIATION OF COUNTY JUDGES

OFFICE OF THE PRESIDENT

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**Hon. James Colvin**  
President

October 15, 2009

**Commission on Judicial Operation:**

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c/o Vermont Supreme Court  
111 State Street – Drawer 9  
Montpelier, Vermont 05609

**Re: Association Recommendations regarding Judicial Resource Allocation  
and Response to the Commission on Judicial Operation Interim Report  
and Reports of the Commission's Focus Groups**

Dear Commission Members:

On behalf of the twenty-eight Assistant Judges, one Probate Judge and numerous honorary members of the Vermont Association of County Judges (VACJ), we have unanimously concluded that we must voice our strenuous objection to the Supreme Court's, and by extension the Commission's, outright dismissal of the value and input of the elected judges of our state. Despite our efforts to have at least one Assistant Judge included as a member of the Commission on Judicial Operation, the Supreme Court has decided not to have any of the twenty-eight Assistant Judges represented on the Commission. Given that it is the privilege and duty of the Assistant Judges to budget and administer either all or part of the Superior Courts, Probate Courts, Sheriff's Departments, Jury Commissioners, Notary Publics, County Law Libraries and more, it is truly regrettable that the Supreme Court has left us out of the process by not including at least one of our members on the Commission. Frankly, this intentional exclusion calls into question the motives of the Supreme Court and the Commission since it is difficult to imagine how an objective observer could afford any credibility to such a Commission, when more than half the total number of judges in the state have absolutely no representation on the Commission.

This criticism is only further supported by the seeming unanimity of the working groups of the Commission who have in chorus called for the elimination of the very judges they chose not to include in the process. Assistant Judges were not even invited to be voting members of

the working groups, but could of course express their views to the groups if they so chose. It truly boggles the mind as to how the Supreme Court can expect the people of our state, let alone our legislators, to view the Commission's process of formulating its "recommendations" as having any credibility. It is reasonable and legitimate to conclude from the exclusion of the state's elected judges from this process that eliminating these judges was a foregone conclusion.

A great deal of attention has been focused by the Supreme Court and the Commission regarding Chapter II, Article 4 of the Vermont Constitution. Article 4 of the 1793 Constitution pretty much remained the same until 1974 and while it is correct that the reference to a "unified" court system was added in 1974, the Commission has taken that term and incorrectly interpreted it to give the Supreme Court license to "consolidate" the court system of the state. Article 4 of the 1793 Constitution, as well as its other provisions respecting the judiciary, clearly described a "unified" court system, but more explicitly. The 1974 amendments in essence transferred the maintenance of a unified court system to the legislature choosing to leave the Constitution as a broader policy statement on the issue. The legislature has carried forward the 1793 Constitution's mandate requiring courts to be located in each county **by statute**. By legislative caveat, every court in Vermont affords the people a right to have their matter heard in a courtroom in the county where they live. In furtherance of the apparent effort to consolidate the court system it is being advocated that the state take on the county paid court clerks. This move will obviously only increase the cost to the state. There is no sound economic or policy reason to do this.

The Commission's position thus far is to take the nearly twenty (20) years of very hard work on the part of the Legislature and the Assistant Judges to make Vermont's court more efficient and accessible and simply abandon it. This does not make any sense, economically or from a public policy perspective given the successes of this evolving utilization of Assistant Judges. The Commission has wasted valuable time pursuing a reckless course that does not appear to have any public support, except perhaps among the state bar and the appointed bench. Collectively the Assistant Judges have in excess of \$40,000,000.00 in taxing authority, of which less than 20% is used to fund the superior court, etc. The effort to close courthouses in the guise of saving money misses a fundamental point of community justice. It is wholly proper for the courts to be supported by the communities they serve. The cyclical centralization efforts within the judiciary fail to see the obvious consequences of such a move. Creating a monolithic centralized, touch screen judiciary may serve its employees well, but for those of us in the community it will fail us miserably.

The approach of the Commission has been quite telling. The general public has not been engaged in the process of its "hearings." Rather, the Commission views its constituents as the appointed judges and the lawyers that appear before them. When the Legislature created the Judicial Operation Commission in Act 192 (2008) it did not place it within the judiciary. The Commission is a legislative entity. The Commission's activities are, and always have been subject to Vermont's open meeting law, *1 V.S.A. §§310-314*. From the beginning the Supreme Court has seized hold of the Commission, dominated it with its appointees and then in violation of the law, conducted its meetings behind closed doors excluding the people it is supposed to be serving. Somewhere the Commission has lost sight of the fact that the court is supposed to serve the people.

It should be pointed out that when the Constitution was amended in 1974 to include the word "unified" with respect to our judiciary, the people also voted to amend the Constitution to

increase the terms of Assistant Judges and Probate Judges to four years from two. It was not all that long after the 1974 amendments to the Constitution that the Assistant Judges' role in the courts would become more important as the legislature would ultimately expand their judicial role as presiding judges in various jurisdictions. In 1990 a comprehensive Judicial Operations Study chaired by Senator Edgar May was conducted during a similar time of economic recession. Responding to the recommendations of the *Judicial Operations Management Study - The Vermont Courts: Challenge for Change* or so-called Edgar May Report, the Legislature began a process of establishing pilot projects in various counties giving the Assistant Judges presiding judge authority in certain cases and then upon favorable reports the Legislature ultimately extended these jurisdictions statewide.

Since the legislature's recent comprehensive study of the Vermont Judiciary, the aforementioned "Edgar May Report," the Legislature has gradually and methodically established areas of limited jurisdiction with Assistant Judges presiding alone, to in effect implement the recommendations of the May Report. The May Report identified the Assistant Judges in Vermont as an "under-utilized" judicial resource and went on to suggest limited jurisdiction assignments of Assistant Judges, similar to that of other states. *See Generally; Act 221, §20 (1990 Adjourned Session); 4 V.S.A. §22(d); 4 V.S.A. §461a(a); 4 V.S.A. §461b(a); 4 V.S.A. §461c(a); 12 V.S.A. §5540; See Also 12 V.S.A. §5540a; 4 V.S.A. §444a.*

Respecting this expanded jurisdiction, a member of this Commission said during the 2004 legislative study of the Assistant Judges' jurisdiction that, "I've sat in small claims and I have some sense of them. ... Now it [assistant judges doing small claims] has gone on for a number of years, we have virtually no appeals, very, very few complaints, that I know of. I've asked Lee [Lee Suskin], I've asked trial judges, and the system seems to be working well. ... And so, I've come around to the view that this looks to be a workable system. ... We have the resource, we're paying \$365,000 a year for it. I think it is a better use of that resource for purposes of meeting the various business needs of the public, for a judicial system that it be used for something like small claims, than it be used for something that has atrophied in the traditional role of assistant judges sitting on the bench with presiding judges. And so, I think this is a better use and a better use of money. That is what informs my view, I'd say that is partially philosophical and partially practical." Ironically, in that Commission member's own testimony he criticized the acting judge program, the very program being endorsed by the working groups of the current Commission.

The Assistant Judges, as pointed out in that Commission member's 2004 testimony, are presiding well in these cases -- in fact in thousands of cases. They are doing so with professionalism. The end product of their labors has proven to be more efficient and economical than work done by some of the Assistant Judges' colleagues on the bench. The opponents that have spoken out against Assistant Judges presiding in small claims matters suggest that the very small number of appeals (246 out of 32,554 cases or 0.76%) is not an indication of the success of the Assistant Judges in small claims matters because people are reluctant to appeal. This is simply not true. The bottom line reasons that there are fewer appeals from small claims court with Assistant Judges presiding are simple: 1) the Assistant Judges allow the parties to fully put on their case with respect for their feelings as well as their "facts." This engenders a belief that, even if they lose their case, they had a full opportunity to be heard, and that the Judge listened to them; and 2) the Assistant Judges help the parties to come to a stipulated settlement by more effectively encouraging them to avail themselves with the benefits of mediation.

It should be noted as well that the extensive training and examination that the Assistant Judges must go through both by statute and by VACJ (Vermont Association of County Judges) practices are being taught and administered by Vermont Law School. This is a rigorous program with examinations that many attorneys privately have admitted they would have difficulty passing. Hundreds of hours of training are required in numerous legal disciplines before an Assistant Judge is permitted to preside in these cases. It is noteworthy that all of this training costs the judiciary nothing. It is paid for by the counties. Assistant Judges are excluded from the state's judicial college, even when they have asked to be included at county expense.

In many jurisdictions in the United States, if not most, the people have a right to a jury in most civil court proceedings, including the family court. The Assistant Judges play a very important role in Vermont's courts as the eyes and ears of the community that elected them. It is reckless to take such an important feature of our courts and simply toss it out. The Assistant Judges bring to each case an important continuity and community insight that is too often lost or simply not observed by a presiding judge who sits in that county for 12 months and then rotates out to another county. The Assistant Judges receive extensive training for this role as well. After first being elected each Assistant Judge attends the judicial college in Reno Nevada and is further trained and mentored in a comprehensive "traditional role" training program developed by the VACJ. The people of Vermont deserve, if not demand, having a "jury" in these cases that the Assistant Judges now sit serving in that capacity. If the Commission is seriously considering suggesting that the Assistant Judges no longer serve as this "jury" in these important cases and have no intention of replacing it with a jury of peers, that is tragic indeed. Legal scholars may debate whether family court matters are "suits at common law" which implicate the right to a jury pursuant to the 7<sup>th</sup> amendment, but regardless, to the people going through the difficulties implicit in most Family Court proceedings, having three judges deciding their cases rather than one is welcome. This is a legitimate concern given that the presiding judge in the preliminary court appearances of a case has often been "rotated out" by the time the final proceedings occur.

Lastly, the assertion that cutting the Assistant Judges' judicial function will save money is fundamentally flawed. Combined, the Assistant Judges statewide provide a valuable resource in the Family Court, freeing up the presiding judge by hearing uncontested divorce cases. This alone effects a significant savings in judge time.

In 2008 approximately \$73,260.00, or \$19.11 per hour, was paid to the eight Assistant Judges to preside in the 5,709 small claims cases that came before them. It is a specious proposition to suggest that it would be more efficient for an appointed judge to preside in these matters (appointed judge time is very hard to find and schedule). It is equally specious to argue that it is more economical since our appointed judges with benefits are paid \$76.79 per hour. So then the Commission is recommending that we should pay \$294,381.00 to have those same 5,709 cases handled. Worse yet the Commission suggests we use acting judges, a program which has no training requirements and which has been harshly criticized recently by our Supreme Court -- the selfsame court which now appears to be embracing it.

Similarly, in 2008 fourteen Assistant Judges were presiding in traffic court matters and disposed of 7,552 cases. They were compensated \$57,027.00 or \$7.55 per case. Astoundingly at the same time two (2) full time, and one (1) retired part time, traffic hearing officers were paid by the state \$257,793.00 to hear 6,772 cases or \$38.06 per case. The recommendation of the Commission is to remove the Assistant Judges from these cases and to replace them with one new hearing officer. This makes no sense either in efficiency or economy. If it takes two full time

and one part time hearing officer to hear just 6,772 cases, how is it possible for one more hearing officer to hear the 7,552 cases that the Assistant Judges are now hearing. Additionally since a hearing officer is paid with benefits just under \$123,000.00, simple math indicates that this will increase, not decrease, the cost to the state by more than \$65,000.00 per year.

To paraphrase Edmund Burke and George Santayana, those who either ignore or don't know history are doomed and bound to repeat it. Prior to the Assistant Judges being given expanded jurisdiction the civil courts in particular had huge backlogs of cases. In this environment of cutbacks how does it make any sense to argue that the courts will be more efficient with fewer judges to hear cases. Recent history bears this out. The false panacea of a techno-court being the solution to our scarce judicial resources is just nonsense. The people of our state have real cases and controversies that cannot be solved by a computer. They need and deserve to have a judge hear their cases in a timely manner and in their county. Justice delayed is justice denied. The Commission should not ignore the lessons of history.

This is not the first attack on the institution of the Assistant Judges and county government. Each time such an attack has been attempted in the past, Assistant Judges have been seen as the voice of reason. The attempts have failed and Assistant Judges have been asked to assume additional judicial duties. During the debate on the 1971 proposals that ultimately became the 1974 amendments to the Constitution there was a similar concerted effort by the judiciary and the state bar to get rid of the Assistant Judges altogether. The result? The legislature and ultimately the people of the state voted overwhelmingly to increase the Assistant Judge's term of office to four years from two. In the last 35 years alone this is the fourth such attempt to do away with the Assistant Judges. The proposals that are being considered/advanced by the Commission are not new. They manifest merely the xenophobic prejudices of the legal "establishment" against non-attorney judges.

Collectively, Assistant Judges can make major contributions to solutions of the judiciary's fiscal problems. It is sad indeed that rather than work together to solve these problems, the judiciary has chosen to use a financial crises for which Assistant Judges bear no responsibility as an excuse to get rid of a tradition of justice in this state which is as old as the Union itself. There is not a county in the state whose budget is not balanced. While the state courts need to close their doors to make it through this crisis, the county courts have no such problem.

It is time for the acrimony to end. The assertion that: 1) doing away with half of the judges in the state, 2) taking on responsibility for the salaries and benefits of county employees and 3) hiring more (more highly compensated) judges and hearing officers will, somehow, save money and promote efficiency does not match up with either the present reality of judiciary's situation or its wildest hopes for the future. It is not too late to sit together, at the same table, and work this out -- together. We have always been ready to do that. The question is are you ready? It is my sincere hope that we hear from you, thus I remain . . .

Sincerely yours,

A handwritten signature in cursive script that reads "James Calvin".

Hon. James Colvin  
President