STATE OF VERMONT

JUDICIAL ETHICS COMMITTEE

Opinion No.:	26
Date:	December 4, 2023
To:	[name redacted in posted version pursuant to A.O. 35, ¶ 6]

The Committee has researched and reviewed the matter you presented to it. The following is the opinion of the Committee and a response to your inquiry pursuant to Administrative Order No. 35.

Questions Presented

May a Vermont Supreme Court justice serve as a mentor for a sitting member of the Vermont General Assembly who is seeking to satisfy the mentorship requirement under Vermont Rule of Bar Admission 12(a)(2)?

Short Answer

Yes, the Vermont Rules of Bar Admission contemplate that a judge may serve as mentor to an individuals seeking admission to the Bar of the Vermont Supreme Court, and no provision of the Vermont Code of Judicial Conduct prohibits them from doing so, even if the individuals also serve as state legislators. However, before engaging in the mentorship, the judge should carefully weigh several considerations.

Relevant Canons of Judicial Conduct

The relevant provisions of the Vermont Code of Judicial Conduct 2019 ("the Code" or "VCJC") include the following rules from Canons 1-4:

- Rule 1.2: A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

- Rule 1.3: A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so.

- Rules 2.11(A): A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. . . .

- Rule 2.11(D)(3): A judge shall disclose to the parties on an ongoing basis . . . (3) any other fact or matter relevant to the question of impartiality that, in the judge's view, may require disqualification under Rule 2.11(A). Unless a party promptly moves to disqualify on the basis of a disclosure under (1) or (2), the judge may continue to participate in the proceeding.

- Rule 3.1: A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not: (A) participate in activities that will interfere with the proper performance of the judge's judicial duties; (B) participate in activities that will lead to frequent disqualification of the judge; (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality; (D) engage in conduct that would appear to a reasonable person to be coercive; or (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

- Rule 3.2: A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except: (A) in connection with matters concerning the law, the legal system, or the administration of justice; (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or (C) when the judge is self-represented in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity; and

- Rule 4.1(A): A judge shall not: (1) act as a leader or hold an office in a political organization or take part in any political campaign; (2) publicly endorse or publicly oppose a candidate for public office; (3) make speeches on behalf of a political organization; (4) participate in political caucuses or meetings; (5) pay an assessment or make a contribution to a political party, organization, or candidate, or purchase tickets for political party dinners or other functions; (6) solicit funds for a political party, organization, or candidate; or (7) engage in any other political activity except as authorized under any other provision of this Code, or on behalf of measures to improve the law, the legal system, or the administration of justice. .

Analysis

Rules of Bar Admission Contemplate Judges As Mentors

An applicant for admission to the Bar of the Vermont Supreme Court who seeks admission by examination "must complete a mentorship under the supervision of a judge

or attorney practicing in Vermont." V.R.Bar.Admis. 12(a)(2). The mentorship must last at least 6 months. *Id.* "The mentorship program requires personal contact between the mentor and the new lawyer to foster a personal connection that will continue beyond the formal program requirements." V.R.Bar.Admis. 12, Board's Notes. A mentorship must include at least 10 regular meetings with the mentor to discuss the applicant's practice and Vermont practice and procedure, and the applicant must also "engage in at least 40 hours of activities on the mentorship program list compiled by the Board of Mandatory Continuing Legal Education and certified by the Board of Bar Examiners as satisfying the requirements of this Rule." V.R.Bar.Admis. 12(a)(2)(A)–(B). The 40 hours of activities include attendance at bar functions, work that fosters access to justice, and a variety of litigation and transactional law activities, such as attending hearings and trials, attending mediation sessions, and drafting wills and contracts. See Mentorship Program List and Certification of Attending Approved Activities, available at https://www.vermontjudiciary.org/sites/default/files/documents/900-00012_1.pdf.

The Rules of Bar Admission expressly provide that judges, include Supreme Court justices, may serve as mentors, and doing so furthers the positive involvement of judges in the development of lawyers and the legal profession. No provision of the Code bars it.

Situation Is Unique with No Clear Prohibition

That the proposed mentee is a legislator and the proposed mentor is a sitting Justice of the Supreme Court presents a unique situation. Although some ethics committee opinions address relationships between judges and legislators, this Committee found none in which a judge has mentored a legislator's admission to the legal profession. For example, the New York Advisory Committee concluded that a judge's attendance at a state legislator's retirement dinner was a permissible extra-judicial activity, as long as the judge would "not sit on the dais, if there is one," and would avoid activities that might be perceived as political. NY Jud. Adv. Op. 90-154 (Oct. 23, 1990). The same committee concluded that a judge who is married to a county legislator must disqualify himself when his spouse or the county legislature is a named party in a case before the judge, and when his spouse has personal involvement in a case, but need not recuse from a challenge to a county law merely because his spouse supported or opposed the law in question. NY Jud. Adv. Op. 18-12 (Jan. 24, 2018).

While the situation of a judge mentoring a legislator to be admitted to the bar has not been specifically addressed in ethics opinions, there are opinions, and rules, that provide guidance for the judge in deciding whether or not, in any specific case, it is wise to undertake the mentorship.

Particular Considerations

Any judge should consider several possible concerns when mentoring a legislator, and these considerations likely are amplified by the higher public profile of a Supreme Court justice. These considerations should be balanced with the desirability of having the justices participating in the Bar's mentorship requirement, as that participation helps

integrate the justice into the legal community and promotes understanding of the judicial system. See Rule 3.1, cmt. 2 ("Participation in both law-related and other extrajudicial activities helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system.")

Avoiding the Appearance of Impropreity

A judge must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Rule 1.2. The consultations between the Justice and the legislator should remain confined to topics connected to "the law, the legal system, or the administration of justice" or "matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties." Rule 3.2(A)–(B). Whereas other attorney-mentors may be able to readily involve their mentees in activities within their own work to satisfy some of the 40-hour activity requirement, given the role of the legislative branch in relation to that of the judiciary, the justice would have to consider issues related to separation of powers and the appearance of undermining public confidence in the independence of the judiciary before involving a legislator-mentee in certain work within the Supreme Court. See Vt. Const. ch. II, § 54 (prohibiting one person from "holding or exercising more than one" of a list of enumerated offices at one time, which include Supreme Court justice, member of the Senate, and member of the House of Representatives); the Code, Rule 1.1 (judge must comply with the law); but see Judicial Ethics Committee Opinion Number: 2728-17, 2015 WL 3602346, at *5 (allowing Vermont probate judge to serve on commission in executive branch with cautionary note that judge should "continually watch for overlap between matters of the commission and judicial duties that could compromise the independence or appearance of independence of the judiciary"); *Matter of Disciplinary Proceeding Against Niemi*, 820 P.2d 41, 42 (Wash. 1991) (holding that state legislator did not violate Code of Judicial Conduct or separation of powers doctrine by acting as pro tempore judge).

A justice considering mentoring a state legislator should assess the degree to which the public profile of the legislator (and the justice) may elevate the level of public scrutiny of the relationship. "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others or allow others to do so." Rule 1.3. For example, when assisting the prospective mentee to arrange activities to meet the mentorship's 40-hour requirement, the justice should take special care that it does not appear that the justice or the mentee is using the prestige of the justice's office to advance the mentee's personal interests. This concern arises in contexts other than mentorship, such as when a justice is asked to provide a reference for employment, but may be particularly sensitive in this context where the justice may have access to unique opportunities. In making such arrangements, particularly if they involve contacting practicing attorneys or other legal professionals, the justice must avoid doing so in a manner "that would appear to a reasonable person to be coercive." Rule 3.1(D). A communication from a Supreme Court justice to an attorney requesting that the attorney take on the mentee for an activity, such as participating in a mediation or drafting a contract "might create the risk that the person solicited would feel obligated to respond

favorably, or would do so to curry favor with the [justice]." *Id.*, cmt. 4. The justice should also consider how such communications could be received during times in which the mentee is campaigning for office. Rule 4.1(A)(2) (forbidding judges from "publicly endors[ing] or publicly oppos[ing] a candidate for public office).

Minimizing Future Disqualification

Another consideration is the probability that the mentoring relationship may lead to future disqualification, if the lawyer practices in the courts. See Rule 3.1 ("[W]hen engaging in extrajudicial activities, a judge shall not: **(A)** participate in activities that will interfere with the proper performance of the judge's judicial duties; **(B)** participate in activities that will lead to frequent disqualification of the judge."). The Code requires a judge to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer." Rule 2.11(A)(1). While similar considerations arise when a personal friend, former colleague, or employee appears in a matter before the court, the legislator-justice roles may add a level of concern

Disqualification is not automatically required, even if the Supreme Court is called upon to review laws that originated as bills that the mentee sponsored. See *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 916 (2004) (Scalia, J.) (mem.) ("But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer."). "A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling." *Id.*

While the mentor-mentee relationship would not necessarily lead to disqualification in cases where the mentee acts as an advocate or where the Supreme Court reviews a law that is strongly associated with the mentee as legislator, disclosure to the parties may be well advised. Rule 2.11(D)(3) ("A judge shall disclose to the parties on an ongoing basis . . . any other fact or matter relevant to the question of impartiality that, in the judge's view, may require disqualification under Rule 2.11(A)."); V.R.A.P. 27.1(b)(4); see American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 488 at 6, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_488.pdf (discussing close personal relationships). If a party moves to disqualify the justice, the justice could then recuse or certify the matter for decision. V.R.A.P. 27.1(b)(2)(A)–(B).

Conclusion

Nothing in the Vermont Code of Judicial Conduct prohibits a Supreme Court justice from servicing as a mentor to a state legislator who is seeking admission to

the Vermont bar. The justice must, however, scrupulously ensure that the arrangement sparks no appearance of impropriety or coercion on other members of the legal profession to favor the mentee. Similarly, the potential of future disqualification should be minimized.

Some members of this Committee are concerned that the appearance of impropriety would be so predominant, particularly given the need of the justice to reach out to attorneys and others in the legal profession to ensure that the mentee can complete access the variety of legal activities contemplated by the admissions rules, that any such mentorship would be ill-advised, but the majority of the Committee advises that the justice must weigh the specifics of the situation and that ultimately, the decision must be a judgment call for the justice.

Members of the Judicial Ethics Committee

Eileen M. Blackwood, Esq., Chair

Honorable Thomas A. Zonay

Honorable James R. Dean Mahoney

Honorable Brian Valentine

Ian Carleton, Esq.