



STATE OF VERMONT
JUDICIAL ETHICS COMMITTEE

Opinion No.: 30
Date: October 4, 2024
To: [name redacted in posted version pursuant to A.O. 35, ¶ 6]

The Committee has considered 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.

Question Presented

May a part-time probate judge who also practices criminal law join the Vermont Association of Criminal Defense Lawyers?

Short Answer

The Committee believes that a probate judge’s membership in the Vermont Association of Criminal Defense Lawyers likely is not permitted under the Vermont Code of Judicial Conduct.

Relevant Provisions of Code of Judicial Conduct

The relevant provisions of the Vermont Code of Judicial Conduct 2019 (“the Code” or “V.C.J.C.”) include the following rules and guidance:

- Terminology: “Continuing part-time judge” means a judge who serves repeatedly on a part-time basis by election or under a continuing appointment. The term includes probate and assistant judges. See Application, section B.
- Application (B): CONTINUING PART-TIME JUDGE. A continuing part-time judge: (1) is not required to comply (a) except while serving as a judge, with Rules 2.10(A) and 2.10(B) (Judicial Statements on Pending and Impending Cases); (b) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), and 3.11(B) (service as officer,

director, or in other capacity in business entity) ... [and] (2) shall not act as a lawyer in any case in any unit of the division of the court in which the judge serves or in any unit in any division of the superior court in a proceeding in which the judge has served as a judge or in any other proceeding related thereto..

- Canon 1, 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.
- Canon 3, Rule 3.1(C): 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: . . . participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality....
- Canon 3, Rule 3.7(A): Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities: (1) assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds; (2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority; (3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fundraising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice; (5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and (6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity: (a) will be engaged in proceedings that would ordinarily come before the judge; or (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Analysis

As a continuing part-time judge, a Vermont probate court judge is permitted to practice law and to serve in any capacity in any business entity. V.C.J.C. Application (B).

However, in doing so, the judge is required “to 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. Thus, Rule 3.1 forbids participation “in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” Rule 3.7 specifically allows a judge, “[s]ubject to the requirements of Rule 3.1, [to] participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice,” but comment 2 to the rule cautions that “[e]ven for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge’s participation in or association with the organization, would conflict with the judge’s obligation to refrain from activities that reflect adversely upon a judge’s independence, integrity, and impartiality.” Rule 3.7, cmt. 2.

Ethics committees have generally concluded that judges may participate in membership and other activities in bar associations. *See* Garwin *et al.*, Annotated Model Code of Judicial Conduct (2d) at 341. However, that participation is not without limits. For example, the Connecticut Committee on Judicial Ethics noted that a judicial official could join a local bar association, “but should regularly reexamine the activities and rules of the association to determine whether it is proper for the Judicial Official to continue his or her relationship with it and should carefully consider whether the Judicial Official’s identification with or involvement in specific programs or activities of the association may undermine confidence in the Judicial Official’s independence, integrity and impartiality or may result in frequent disqualification of the Judicial Official.” Extrajudicial Activities; Membership, 2019-04, 2019 WL 8645896, at *2 (CT Comm. Jud. Eth. Dec. 19, 2019).

A judge’s participation in a specialty legal association like the Vermont Association of Criminal Defense Lawyers raises more concerns. *See* Jud. Eth. Comm. Op. No: 2728-13, 2008 WL 8681504, at *4 (Vt. Jud. Eth. Comm. May 1, 2008) (“In general, judges are cautioned to exercise more care before participating in specialty bar associations than in a generalized bar association such as the VBA.”). Unlike a local bar association that is open to all attorneys in the state, the application to join the Vermont Association of Criminal Defense Lawyers requires members to sign a “certification of non-prosecution,” which states, “I certify that I am not engaged in the prosecution of any criminal cases.” www.vtacdl.com. The Association’s website says that it “provides assistance and support to you as a criminal defense attorney, offering a unified voice in the State of Vermont.” *Id.* As an association of defense attorneys that assists and supports the defense bar (and not the prosecution) in criminal justice matters, the organization appears to be partial to one group of lawyers and thus “could reflect negatively on the Judicial Official’s impartiality and independence and create the appearance of impropriety.” Extrajudicial Activities; Impartiality; Appearance of Impropriety, 2017-07, 2017 WL 6347236, at *2 (CT Comm. Jud. Eth. July 20, 2017) (concluding that a judicial official should not belong to an association of defense lawyers). Because of the changing nature of an organization over time, “participating judges are cautioned to continually re-evaluate whether the organization is an appropriate one in which to participate.” Op. No. 2728-13, 2008 WL 8681504, at *5.

While a probate court judge is permitted to represent individual criminal defendants, membership in an organization that broadly supports lawyers on one side of the criminal justice system is far more likely to trigger concerns about impropriety, lack of independence, or impartiality. Membership implies support for the positions and actions of the organization, whose membership is partial to one group of attorneys or litigants. While the concern is obviously greater when the organization is related to the subject matter of the court in which the judge sits, the partiality reflected in the organization's purposes may affect public confidence even if the partiality is not the subject matter of the court in which the judge serves.

Conclusion

It is the opinion of this Committee that a judge's membership in a specialty bar association such as the Vermont Criminal Defense Lawyer's Association, which assists and supports only the criminal defense bar, could be seen as affecting a judge's impartiality, integrity, and/or independence and thus erode public confidence in the judiciary. The Committee therefore concludes that such membership by a judge is likely not permitted by the Code.

Eileen M Blackwood

Eileen M. Blackwood, Esq., Chair

Signed by:

Thomas Zohay, Chief Superior Judge
Honorable Thomas A. Zohay

Signed by:

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