



**STATE OF VERMONT**  
**JUDICIAL ETHICS COMMITTEE**

Opinion No.: 32  
Date: December 20, 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 Vermont probate judge serve as a Deputy State’s Attorney in a different county than the one in which the judge sits as probate judge?

**Short Answer**

Yes, the Committee believes that a Vermont probate judge may serve as Deputy State’s Attorney in another county.

**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 2, Rule 2.1: The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.
- Canon 3, Rule 3.10: A judge shall not practice law. A judge may be self-represented and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum.

The following Vermont statute is also relevant:

- 4 V.S.A. § 354: A judge or register shall not act as guardian, executor, administrator, trustee, or in any other fiduciary capacity or as attorney in any probate matter pending in any court in the State while holding either office. A judge or register who violates a provision of this section shall be imprisoned not more than six months or fined not more than \$500.00, or both. (Amended 1961, No. 149, eff. June 7, 1961.).
- 24 V.S.A. § 363: (c) Deputy State's Attorneys shall exercise all the powers and duties of the State's Attorneys except the power to designate someone to act in the event of their own disqualification.
- 24 V.S.A. § 361: (a) A State's Attorney shall prosecute for offenses committed within his or her county, and all matters and causes cognizable by the Supreme and Superior Courts on behalf of the State, file informations and prepare bills of indictment, deliver executions in favor of the State to an officer for collection immediately after final judgment, taking duplicate receipts therefor, one of which shall be sent to the Commissioner of Finance and Management, and take measures to collect fines and other demands or sums of money due to the State or county.

### **Analysis**

A probate judge is considered a "continuing part-time judge" in Vermont. V.C.J.C. Terminology. Continuing part-time judges are not required to comply at any time with Rule 3.10, the rule that prohibits a judge from practicing law. V.C.J.C., Application (B)(1)(b); V.C.J.C. Rule 3.10. However, if a probate judge does practice law, the judge "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." V.C.J.C.,

Application (B)(2). Additionally, a probate judge is not permitted to act “as attorney in any probate matter pending in any court in the State.” 4 V.S.A. § 354.

Generally, the duties of a Deputy State’s Attorney --“to prosecute for offenses committed within his or her county,” 24 V.S.A. § 361, 363 – would not require appearance in probate court, and there is no rule expressly prohibiting a probate judge from working as a Deputy State’s Attorney in another county. However, probate judges must still comply with the general rule that a judge “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” V.C.J.C Rule 1.2. In addition, the probate judge’s “duties of judicial office, as prescribed by law, shall take precedence over all of a judge’s personal and extrajudicial activities,” including duties as a prosecutor. VC.J.C. Rule 2.1. This committee has noted that the Code may act as a bar to dual service in the judiciary and executive branch if the service “could compromise the actual or perceived independence of the judiciary.” Vermont Judicial Ethics Committee Op. No. 2728-17, 2015 WL 3602346, at \*3 (April 30, 2015).

Other jurisdictions with similar part-time judicial offices have reached similar conclusions. For example, the Colorado Judicial Ethics Advisory Board concluded that a “part-time judge may act as a part-time prosecutor in an adjoining judicial district. However, he may not use any nonpublic information that he acquires in a judicial capacity while acting in his prosecutorial capacity.” C.J.E.A.B. Advisory Op. 2023-01 \*3 (July 25, 2023). *See also* SC Adv. Comm. on Standards of Jud. Conduct Op. No. 4-1996 (part-time municipal judge may represent criminal defendants in other municipal courts because no overlapping jurisdiction); NY Adv. Comm. On Jud. Ethics Op. 92-35 (attorney and part-time judge can serve as trial counsel in criminal case in State Supreme Court.).

Thus, a judge who also serves as a Deputy State’s Attorney must take particular care to ensure that their duties and actions as a prosecutor do not detract from public confidence in the independence, integrity, and impartiality of the judiciary. In addition, the judge must ensure that their duties as probate judge always take precedence over their prosecutorial duties. Serving as both a probate judge and a Deputy State’s Attorney, in separate counties, will require a judge to vigilantly maintain the separation of the two roles and “watch for overlap between matters of the [state’s attorney’s office] and judicial duties that could compromise the independence or appearance of independence of the judiciary.” *Id.* at \*5.

## **Conclusion**

It is the opinion of this Committee that a Vermont probate court judge may serve as a Deputy State’s Attorney in a different county than the one in which the judge serves as probate judge. However, the judge must ensure that their judicial duties always take precedence and must act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.

*Eileen M. Blackwood*

Eileen M. Blackwood, Esq., Chair

Signed by:

*Thomas Zonay, Chief Superior Judge*

Honorable Thomas A. Zonay

Signed by:

*James Mahoney*

Honorable James R. Dean Mahoney

Signed by:

*Brian Valentine*

Honorable Brian Valentine

Signed by:

*Ian Carleton*

Ian Carleton, Esq.