

**STATE OF VERMONT
VERMONT SUPREME COURT
DECEMBER TERM, 2011**

Order Promulgating Amendments to the Vermont Code of Judicial Conduct

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Section 5A(3) of the Vermont Code of Judicial Conduct be amended to read as follows (new matter underlined):

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) a judge of probate or an assistant judge may be a candidate for reelection or may serve as town meeting moderator, and

(b) an assistant judge or a candidate for the office of assistant judge may also seek election to the office of probate judge, and a probate judge or a candidate for the office of probate judge may also seek election to the office of assistant judge, and in either case, if otherwise qualified and elected to both offices, may serve both as an assistant judge and as a probate judge,

provided that the judge or candidate complies with the provisions of Section 5C.

Reporter's Notes—2012 Amendment

Section 5A(3) is amended for consistency with the language of 4 V.S.A. § 278(a), as added by Act 154 of 2009 (Adj. Sess.), § 17a, effective June 3, 2010, providing that an assistant judge or candidate for that office may run for the office of probate judge and, if elected to both offices, may serve in both. New § 5A(3)(b) of the Code tracks the language of the statute, with the addition of a clause making clear that a sitting probate judge, as well as a candidate for that office, may run for the office of assistant judge. The offices of probate judge and assistant judge are not

among those declared to be incompatible by Chapter II, Section 54, of the Vermont Constitution.

The statute and the amended Code provision both address a question raised in *In re Hodgdon*, 2011 VT 19, 189 Vt. ___, 19 A.3d 598, in which the Court held that the Code as it stood prior to the enactment of the statute did not permit an individual to seek both offices simultaneously. The statute did not apply retroactively, and the Court would not judicially amend the Code or give the statute retroactive application. The present amendment, adopted through the normal rule-making process, is intended to avoid “a potential conflict between the new statute and Canon 5A(3) ... that implicates the separation of powers between the coordinate branches of government.” *Id.* ¶ 29.

Subsections (b) and (c) of the statute require disqualification of a judge holding both offices if a probate matter in which the judge has presided in either capacity, or a related probate matter, arises in any division of the superior court. Other provisions of the Code of Judicial Conduct continue to apply to the conduct of a sitting judge or candidate while running for both offices. See, e.g., Canon 3 (judicial duties), except as modified by Application Section A(1)(a); Canon 4 (extra-judicial activities), except as modified by Application Section A(1)(b); Sections 5A(1), 5B (political conduct of incumbent judges and candidates), except as modified by Section 5C and Application Section A(1)(c); Section 5D (successful candidates and unsuccessful candidates who were incumbents may be subject to judicial or professional discipline).

2. That the emergency amendment of Section B of the “Application of the Code of Judicial Conduct” portion of the Vermont Code of Judicial Conduct, Administrative Order No. 10, promulgated on January 31, 2011, effective on that date, be made permanent.

Reporter’s Notes—2012 Amendment

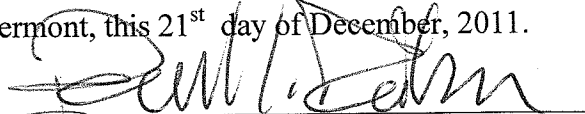
By order of January 31, 2011, effective on that date, the Court promulgated an emergency amendment to Application Section B of the Vermont Code of Judicial Conduct to clarify the application of the Code to probate judges in light of the Court Restructuring Act, Act 154 of 2009 (Adj. Sess.). The Civil Rules Committee was asked to report by April 1, 2011, on its recommendation, if any, on the whether the amendment should be made permanent. No comments have been received on the emergency amendment.

The amendment is now made permanent, because it has achieved its goals of making clear (1) that a probate judge may not act as a lawyer in any case in the probate division of the superior court but may act as a lawyer in any other division of the superior court, except in a case in which the judge presided that may be appealed to the civil division or in a

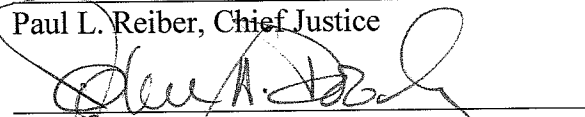
related case in any division that involves the same estate or other matters related to the probate case, and (2) that the purpose of the rule is to prohibit the use of official space in which the judge carries out judicial functions as space which the judge may use for the practice of law.

3. That these rules, as amended or added, are prescribed and promulgated effective February 20, 2012. The Reporter's Notes are advisory.

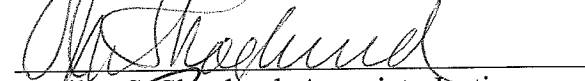
Dated in Chambers at Montpelier, Vermont, this 21st day of December, 2011.



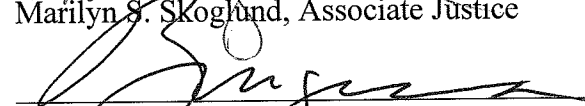
Paul L. Reiber, Chief Justice



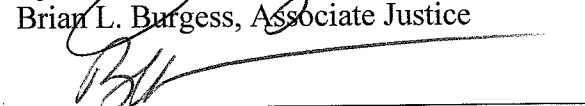
John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice



Beth Robinson, Associate Justice