



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

Opinion No.: 2728-23  
Date: October 7, 2022  
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 probate judge publicly endorse or oppose a candidate seeking the office of probate judge a) who is running against the judge or b) who is seeking the office of probate judge in another county?

**Short Answer**

An incumbent probate judge may publicly endorse or oppose a candidate running against the judge for the same probate judgeship, but not a candidate for any other probate judgeship (or other office).

**Relevant Canons of Judicial Conduct**

Rule 1.3 of the Vermont Code of Judicial Conduct 2019 ("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 4.3(B)(4) of the Vermont Code of Judicial Conduct 2019 ("A candidate for election or reelection as judge of probate or assistant judge may, while a candidate, ... (4) publicly endorse or publicly oppose any candidate for the same office.").

**Relevant State Law**

Title 4, section 272 of the Vermont Statutes Annotated ("§ 272. Probate districts; Probate judges (a) There shall be one Probate district in each county, which shall be

designated by the name of the county. Each Probate district shall elect one Probate judge. ...”)

## Analysis

Rule 4.3 is clear that an incumbent probate judge may endorse or oppose a candidate or candidate with whom the judge is in direct electoral competition—that is, a candidate running for the probate judgeship in the same probate district in which the judge serves. So, the answer to subsection a) of the question is certainly yes.

The issue raised by subsection b) may best be framed as, “What does ‘same office’ mean?” Does it refer to the specific probate judgeship for which the judge is running, or does it broadly refer to the office of probate judge, regardless of which probate district the judge or candidate represents?

The matter is not reasonably debatable. The Code permits an incumbent probate judge to endorse or oppose candidates with whom the judge is in direct electoral competition only. Vermont probate judges are elected from a specific probate district. The Code does not permit a judge to endorse or oppose a candidate for office in a different probate district or unit of the Superior Court.

“[P]robably no area is more fraught with potential for ethical misconduct than judicial political conduct.” ABA, Annotated Model Code of Judicial Conduct at 478 (3d ed. 2016). Canon 4 of Vermont’s 2019 Code provides the general rule: “A judge or judicial candidate shall refrain from inappropriate political activity.” Rule 4.1(A) broadly counsels against political activity and specifically bars the public endorsement or opposition to candidates for public office. Rule 4.1(A)(2).<sup>1</sup> Probate judges are generally required to comply with Rule 4.1 when “serving as a judge or seeking appointment, confirmation, retention, election, or re-election as a judge.” Vermont Code 2019, Application § (B)(1)(c). Rule 4.3(B) articulates certain limited exceptions to Rule 4.1(A) that apply during elections, including that a candidate may “publicly endorse or publicly oppose any candidate for the same office.” Rule 4.3(B)(4).

Political activity by judges places judicial impartiality, and certainly the appearance of it, at risk. The exceptions to the general proscription on political activity nevertheless reflect the reality that if judges are to be elected, then they must be able to participate effectively in those elections. As one treatise explains, “We might then view [such provisions] as seeking to control political behavior in ways that will assure 1) faithfulness to the electoral process and 2) judicial impartiality and the appearance of impartiality.” Jeffrey Shaman et al., *Judicial Conduct and Ethics* § 11.02 (3d ed. 2000).

The exceptions in the Code are specifically stated and should not be interpreted more broadly than necessary to facilitate the electoral process. Candidates in direct

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<sup>1</sup> Among the specifically stated bars on political conduct is a catchall prohibiting “any other political activity except as authorized under any provision of this Code, or on behalf of measures to improve the law, the legal system, or the administration of justice.” Rule 4.1(A)(7).



competition for the same position (running against each other) must be able to engage in the electoral competition for that position. Rule 4.3(B)(4) permits candidates to endorse or oppose other candidates for the “same office.” It is clear in context that “same office” means the same race in which the incumbent judge is running. Endorsing or opposing candidates in other races does nothing to ensure faithfulness to the electoral process and does not preserve judicial impartiality and the appearance of impartiality. It does the opposite—it lends the prestige of the judge’s office to advance the private interests of others. See Vermont Code of Judicial Conduct 2019 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.”).

The corresponding provision of the ABA Model Code has always been to the same effect. As the Reporter’s Notes reflect, Vermont Code 2019, Rule 4.3 generally “carries forward Vermont Code 1994, Canon 5C.” Canon 5C(2)(d) in fact is identical to Rule 4.3(B)(4). The Vermont Code 1994 was based, with adaptations, on the ABA Model Code of Judicial Conduct 1990.

The corresponding provision of the 1990 Model Code permits a candidate to “publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.” ABA Model Code of Judicial Conduct 1990, Canon 5C(1)(b)(4). This provision was new to the 1990 Model Code. The matter was not explicitly addressed in the 1972 Model Code or the 1924 Canons, although there is no reason to think that the policy was any different prior to 1990. The successor 2007 Model Code slightly modifies the language, but not the substance, of the corresponding provision to permit candidates to “publicly endorse or oppose candidates for the same judicial office for which he or she is running.” ABA Model Judicial Code of Conduct 2007, Rule 4.2(B)(3). The official Comment is not ambiguous: “[C]andidates are considered to be running for the same judicial office if they are competing for a single judgeship or if several judgeships on the same court are to be filled as a result of the election.” That is, the breadth of this exception is limited to those candidates against whom the judge is running.

There is no indication that the decision to simplify the language appearing in Vermont Code 1994, Canon 5C(2)(d) (“same office”) from the clearer but lengthier model language in ABA Model Code 1990, Canon 5C(1)(b)(4) (“same judicial office in a public election in which the judge or judicial candidate is running”) was intended to mark any substantive deviation. The Vermont Reporter’s Notes presumably would have indicated if a substantive change were intended, and they do not. Other variances are documented.

Some states have made different policy choices and adopted language at odds with both the Model Code and Vermont’s. At least one judicial ethics committee, however, has addressed the question presented here in a state with effectively identical language to that of Vermont. The operative provision in Maryland permits candidates to “publicly endorse or oppose candidates for the same judicial office.” There would appear to be no material difference between Maryland’s “same judicial office” and Vermont’s “same office.” The Maryland committee squarely concluded that “same judicial office” refers to the local race


that the candidate is in and not more broadly. See Maryland Judicial Ethics Opinion No. 2016-08, 2016 WL 1314690, at \*4 (“We conclude that ‘same judicial office’ means the orphans’ court or circuit court in each political subdivision. Thus, a ‘candidate for election’ in a circuit court or an orphans’ court may publicly endorse or oppose only those candidates who are candidates in the same orphans’ or circuit court.”). The Maryland committee’s conclusion is sound, and the Committee concludes that the same result should be reached here.

## Conclusion

An incumbent probate judge may publicly endorse or oppose a candidate running against the judge for the same probate judgeship—that is, in the same race. The judge may not, however, endorse or oppose a candidate for any other probate judgeship, as the exception to the ban on political activity by judges should be narrowly construed to allow an elected judge to appropriately campaign only for an office for which the judge is a candidate. Allowing probate judges to weigh in on the election of their peers would likely appear to be an abuse of the prestige of judicial office in violation of the Code.

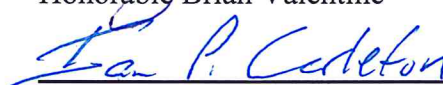
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