RELEVANT PORTIONS OF THE VERMONT STATE CONSTITUTION:

VT Const. Ch. II, § 5. [Departments to be distinct]
The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.

VT Const. Ch. II, § 30. [Supreme Court; Jurisdiction]
The Supreme Court shall exercise appellate jurisdiction in all cases, criminal and civil, under such terms and conditions as it shall specify in rules not inconsistent with law. The Supreme Court shall have original jurisdiction only as provided by law, but it shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction. The Supreme Court shall have administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers and attorneys at law in the State.

VT Const. Ch. II, § 37. [Rule-Making Power]
The Supreme Court shall make and promulgate rules governing the administration of all courts, and shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. Any rule adopted by the Supreme Court may be revised by the General Assembly.

THE REGULATION OF THE PRACTICE OF LAW, PRACTICE AND PROCEDURE, AND COURT ADMINISTRATION IN VERMONT—JUDICIAL OR LEGISLATIVE POWER?

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I. INTRODUCTION

In 1974, Vermont amended the sections of its constitution that describe the Judiciary Department, the first amendments in this area since the adoption of the current constitutions in 1793. The legislative history of the amendments suggests that they were intended to modernize the structure and operation of the courts, as well as to serve as the constitutional embodiment of certain policies that had been created by statute over the previous 170 years. The 1973 provisions, which the amendments replaced, were brief and incomplete, the structure of the courts being largely determined by two sentences in one section of the constitution. The judicial selection methods, generally election by the legislature every two years, were archaic.

The 1974 amendments brought about a number of important changes. The courts were unified under the Vermont Supreme Court. The structure of the lower courts was left to the legislature, with a limited definitional role for the supreme court. The selection of most judges was transferred to the Governor, with the advice and consent of the Senate, based on nominees presented to the Governor by a judicial nominating body established by the legislature. At the end of each six-year term, the legislature retained the power to vote not to continue a judge in office. The amendments provided for mandatory retirement of judges at seventy years of age. The amendments also

formally recognized the supreme court's rule-making power, subject to revision by the legislature. Finally, they gave the supreme court the power to discipline lawyers and judges.

Some parts of the 1974 amendments are clear and self-executing. Other parts have proven to be less than clear, particularly as they describe the relationships between the judicial and legislative powers. In the last few years, there have been recurring differences between the supreme court and members of the legislature over the powers of the court. Because of these disputes, the legislature created the Legislative Committee on Judicial Rules which was directed to review the actions of the judiciary in areas other than the deciding of cases.

The first annual report of the Legislative Committee on Judicial Rules indicates skepticism about the constitutional authority for some of the actions of the supreme court. In part, the report blames the 1974 constitutional amendments:

> The Committee finds that the provisions under the present constitution, statutes and rules have created a potential for conflict in defining the proper roles of the two branches. As a result there is considerable uncertainty as to the validity of a number of current practices . . .
>
> [E]ven if legislation is enacted so as to eliminate conflicts between court rules and statutes, and to establish more clearly the interaction between the two branches on matters of mutual concern, the provisions of the Vermont Constitution will continue to leave room for argument over the extent of the Judiciary's power vis-a-vis the powers of the Legislature . . .
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> It seems, therefore, that it may be an appropriate time to rectify the omission through amendment of the Constitution. By so doing, the potential for future conflict between the judiciary and the legislative branches should be lessened substantially. In order to eliminate current uncertainties and to provide a means for public discussion of these issues, the committee is recommending both statutory changes and the consideration of possible amendments to the Constitution.

The committee suggested three alternative amendments to the constitution. One of these was offered in the 1982 legislative session but was not considered.

While the report of the Legislative Committee on Judicial Rules would suggest clear and sharp differences over the meaning and consequences of the current constitutional provisions, neither branch has taken definitive positions on any of the issues brought into focus by the amendments. Indeed, it is not always clear precisely what those issues might be. There is instead a general feeling that each has invaded the other's "turf."

This article will explore three of the areas containing potential troublesome issues left unresolved by the 1974 constitutional amendments. The areas examined are: practice and procedures, court administration, and the practice of law. These labels are chosen both because they facilitate constitutional analysis and because they represent particularly sensitive areas, ones liable to be the focus of conflict between the legislative and judicial branches.

II. The Judicial Branch Under The Constitution Of 1793 And The Amendments Of 1974

Historians record that one of the main features of the constitutions of the United States and the individual states is that they provide for the separation of governmental power into three distinct branches of government—the legislative, the executive, and the judicial. Madison state in the

Federalist Papers that the accumulation of legislative, executive, and judicial power into one place is "the very definition of tyranny." John Adams wrote that only by balancing the power of one branch against the power of the other two can "the efforts in human nature toward tyranny . . . alone be checked and restrained, and any degree of freedom preserved." The separation of the judicial power from the legislative and executive was particularly important if individual justice were to be available. Alexander Hamilton went as far as to say that there would be "'no liberty' if the power of judging is not separated from the legislative and executive powers."

Vermont adopted the policy of separation of powers in the constitution of 1793. Section 5 provides that: "The Legislative, Executive and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the others." Other sections specify in varying degrees the "powers properly belonging" to each department. The judicial powers, however, are almost entirely unspecified. Similarly, although the 1793 constitution specifies the persons or institutions exercising the legislative and executive powers, it is silent on what person or institution can exercise the judicial power.

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D. *Control Over the Practice of Law Under the 1974 Constitutional Amendments*

Difficulties in interpreting the Vermont Constitution in this area were not eliminated by the passage of the 1974 constitutional amendments. The constitution now provides that the supreme court shall have "disciplinary authority concerning all . . . attorneys at law in the State." It has no parallel provision for other aspects of control of the practice of law. However, the same section gives the supreme court "administrative control of all the courts of the state" and section 37 requires the court to "make and promulgate rules governing the administration of all courts." Rules adopted under section 37 may be revised by the legislature.

The first question raised by the constitutional amendments is what they did to the pre-existing power relationships with respect to the practice of law. There are a number of possible answers. The Attorney General's Opinion analyzes the interrelationship of sections 30 and 37 and concludes:

> 1) The supreme court's power over the disciplining of lawyers is absolute and the legislature has no power in the area;
> 2) Rules on bar admission are rules on "administration" of courts under Section 37 and are therefore subject to revision by the legislature;
> 3) Under Section 30, the supreme court has administrative control over all courts. This is an absolute power in which the legislature may not interfere; and
> 4) Sections 30 and 37 can be reconciled only by limiting the legislature's power to revise court administration rules under Section 37 to instances where the revision does "not interfere with fundamental court policy" and does not "materially interfere with the performance of the court's duty of administration."

The staff of the Legislative Council appeared to accept the view that control over bar admission was part of court administration but were unwilling to accept the balance struck between the sections in the Attorney General's Opinion. In their view, section 37 allowed the legislature to revise any rule of court administration or any rule on any subject.

The first Report of the Legislative Committee on Judicial Rules also looked at sections 30 and 37. While the report is couched in tentative language, its initial conclusion seems to be that the absence of specific constitutional reference to judicial branch control over attorney admission, coupled with the specific reference to discipline, indicates that there is no exclusive judicial power over bar admission under the constitution. It also adopted the view that any rule of the court, including any rule dealing with bar admission, can be revised by the legislature under section 37.

Much of the confusion over the effect of the 1974 amendments on regulation of attorneys resulted from the drafting model chosen. Most of the amendments to the judicial article come from the Model State Constitution, drafted by the National Municipal League. The model is silent on regulation of the practice of law and there is no indication that the silence is intended to change the status quo.

There is nothing in the history of the constitutional amendment that shows the intended effect on the practice of law. The 1965 report of the Judicial Branch Study Committee authorized by the Legislative Council did not discuss the area. The language on control over lawyer disciple was added by the Constitutional Commission, but is not discussed. Nor was it discussed in the available legislative transcripts on the constitutional amendment. One can only speculate that the language on attorney discipline was added as an afterthought to the provision on judicial officer discipline, an area where a real need for specificity was perceived.

For two major reasons, the conclusion of the Legislative Committee that the 1974 amendment negates any judicial power on bar admission, is incorrect. First, the overall policy behind the amendment was to add to or to conserve judicial power. In light of this policy, repeal by implication from an utterly silent record is an unlikely, even contradictory, result. The only precedent, from another state, holds that a specific constitutional provision covering lawyer discipline does not negate the existence of judicial power over bar admission.

The second reason is that it would make no policy sense to separate attorney discipline from attorney admission or other aspects of regulation of attorneys. This separation does not exist in other states. Moreover, the Vermont Supreme Court had held that the power over lawyer discipline is derived from the power over admission. It would be incongruous to take away that power over admission and leave the disciplinary power.

Although the 1974 amendment apparently did not eliminate judicial power over the practice of law, that power is affected by the new constitutional references to court administration and rule-making. It is unlikely that all judicial power over the practice of law can be subsumed under the term "court administration." While there is some overlap, the concepts have different origins and histories. Indeed, application of the term "court administration" to the standards of admission, the ethics of the legal profession, and the definition of unauthorized practice would have placed these areas squarely under the control of the legislature. That the legislature did not control most of these areas is an indication that they were not considered part of court administration.

It is an unlikely interpretation that the "any rules" language of section 37 really means any rules adopted by the court, whether or not pursuant to section 37. This interpretation would virtually eliminate the separation of powers clause. There was not intent to do that in 1974. A more likely interpretation is that the legislature's power to revise rules is limited to rules described in section 37.

A fair interpretation is that the court's inherent power to set admission standards, standards of lawyer conduct, and the definition of the practice of law are like the power to decide cases—essential judicial functions that cannot be exercised by the legislature under the separation of powers clause. However, the means that are used to determine whether applicants for admission to the bar meet the appropriate standards, to determine whether lawyers comply with the proper

ethical rules, or to determine whether particular conduct is the unauthorized practice of law, are all part of court administration. Rules and actions which establish these standards are subject to sections 30 and 37 of chapter II of the Vermont Constitution.

The effect of this categorization is developed in Part V of this article. In short, the effect is as follows:

> 1) The supreme court has the duty and power to create general policies on court administration and issue them as rules;
> 2) The rules of court administration have the force of law—that is, they supersede all prior inconsistent rules or statutes—and may in turn be revised by the legislature; and
> 3) When the supreme court acts pursuant to the general policy—by ruling that the conduct of a particular lawyer was unethical—the specific ruling cannot be revised by the legislature.

Probably the strongest argument for this interpretation is that it clarifies and defines the pre-existing law without changing it to any great degree. The results reached above are roughly the same . . .

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The Vermont Supreme Court's decision in *Granai v. Witters* suggest that the court's inherent power gives it the ultimate responsibility over docketing, scheduling, and related areas. Development in this area may logically have led to the assertion of broader judicial power over practice and procedure, shared with the legislature. This development has not occurred and is unlikely in view of the specific powers in the 1974 constitutional amendments.

(4) *Other*. The term "court administration" is imprecise and elastic: Many miscellaneous issues and cases can be fit within the term. For example, courts have found inherent judicial power over court records, resisting legislative attempts to expunge, change, or seal records. The courts have asserted their inherent power to resist attempts at administrative control, supervision, or investigation by executive branch officials. Other cases have dealt with diverse subjects where some policy is found to be essential to impartial justice. To cite just some examples, the courts have found judicial power to create an *in forma pauperis* authorization, to adopt a Code of Judicial Ethics, to tax jury costs against parties who settle on the eve of trial, and to control the selection of replacement judges.

C. *The 1974 Amendments*

There are two constitutional provisions on court administration. Chapter II, section 37, provides for rules and chapter II, section 30 gives the supreme court administrative control over all courts. For purposes of analysis, it is helpful to start with the former section.

Section 37 has been analyzed in detail earlier under practice and procedure. There is one other part of the legislative history, however, that is relevant to understanding its application to court administration. As the section was reported to the Constitutional Commission, the last sentence read: "Any rule of procedure adopted by the Supreme Court may be revised by vote of the General Assembly." During the deliberation of the section, the counsel to the Senate Judiciary Committee reported that the Chief Justice wanted the section broadened to give the legislature "full authority over all rules." Accordingly, the sentence was changed to say: "Any rule adopted by the Supreme

Court may be revised by the General Assembly as provided by law." Subsequently, the last four words of the sentence were dropped.

The effect of the final language of section 37 is to put rules of court administration and rules of practice and procedure on the same footing. The comment to the Model State Constitution defines the intent of this section as: "to place the responsibility for judicial administration where it properly belongs."

Since administrative and procedural rule-making powers are treated the same way by section 37, the conclusions reached earlier about the procedural rule-making power apply equally to the court's administrative rule-making power. This means:

1. The supreme court has a duty as well as the authority to promulgate rules of court administration.
2. The rules of court administration supersede any pre-existing statutes to the extent of the conflict. The rules may be revised by the legislature.
3. The legislature continues to have the power to enact statutes on court administration. However, court administration statutes that are inconsistent with existing rules should be valid only if they show an understanding of the existence of the rule and an intent to supersede it.
4. The procedures used by the supreme court in adopting court administration rules, and the effective date of such rules, are determined by the court.

There remains to consider only what the constitution means by "court administration." No definition of "court administration" appears in either the constitution or the Vermont experience. Probably the best source of a definition is the Model State Constitution which Vermont adopted in part. The comment to section 6.05 of that constitution indicates that the following activities are included within the term "court administration:"

1. Personnel employment and management;
2. Maintenance of buildings and libraries;
3. Retention of files;
4. Use of systems of accounts for fines and fees;
5. Machinery to keep paper work "flowing in the proper channels;"
6. Planning;
7. Assignment of judges;
8. Supervision of staff;
9. Budgeting.

There are component parts of court administration, but the list is not exclusive. Background papers that accompanied the Model State Constitution stated: "Judicial administration refers to the operation of the machinery of the courts and is primarily concerned with questions of organizational and administrative efficiency and effectiveness." While these definitions are very broad, the overall context of the constitution suggests some exclusions. The first exclusion is for practice and procedure, which is dealt with separately. The second is the regulation of the practice of law as discussed earlier. The third exclusion is for certain basic, inherent judicial powers that should be reserved to the judiciary alone and are thus not subject to legislative review.

The third exclusion is necessary to provide a proper understanding of the last sentence of section 37. It provides that "any rule" may be revised by the legislature. If the words are taken literally,

they would mean that every written policy of the judicial branch, wherever the power to create that policy comes from, can be revised by the legislative branch. This literal interpretation would emasculate the separation of powers clause, since the legislature could review virtually any exercise of judicial power.

There is no indication in the history of the 1974 amendments that this substantial realignment of power between the legislative and judicial branches was either understood or intended. This is especially true since the "any rule" language was added on the request of the Chief Justice who was unlikely to want to undermine the separation of powers clause. Thus, a better interpretation is that "any rule" means any rule promulgated under section 37—that is, any rule of court administration or of practice and procedure as those terms are used in section 37.

If the above construction is correct, there must be an exclusion from "court administration" for the exercise of essential inherent power. This exclusion would have to be relatively narrow, covering only those instances where the principle of separation of powers is directly threatened by legislative action. The presumption should be the policies within "court administration" can be revised by the legislature even if they are central to judicial branch operations.

The effect of section 30 remains to be considered. While this section mentions administrative control, it provides no legislative review power. The Attorney General's Opinion relied on this section to protect inherent judicial power and the separation of powers from legislative control. Thus, the opinion concluded that the effect of section 30 is that the legislature may use its power under section 37 to revise a court rule "only where such revision does not interfere with fundamental court policy or where such revision does not materially interfere with the performance of the Court's duty of administration."

The construction of section 30 appears to be overbroad in the context of the overall amendment. The major impact of the constitutional amendment was to unify the courts under the Vermont Supreme Court. Thus, the constitutional amendments had to say somewhere that the highest court, the "boss," is the Vermont Supreme Court. The Model State Constitution accomplished this by calling the supreme court "the highest court" and making the chief judge of that court "the administrative head of the unified judicial system." The Vermont Constitutional Commission was unwilling to give this power to the Chief Justice alone so it needed alternative language. The language of section 30 fulfills that function.

It is natural that the provision designating the administrative head does not discuss legislative power because it relates to actions taken pursuant to policy. While the legislature has a legitimate claim to participation in policy-making, it has no claim to participation in implementation decisions. For example, the legislature might legitimately desire to participate in policies and guidelines that describe the qualifications that court clerks must have. But it would have no legitimate claim for participation in the decision of whom to hire as court clerk.

This narrower interpretation of section 30 has the added advantage of being consistent with section 37. Therefore, the construction of section 30 adopted here does not affect the conclusions about the section 37 power adopted earlier.

D. *Court Administration—Some Examples*

Given the complicated interrelationship of the sections that describe the court administration power, it may be helpful to examine briefly some of the issues that have arisen.

The legislature has questioned the power of the supreme court to restructure the Board of Bar Examiners and to impose a license fee by rule. Under the interpretations of sections 30 and 37 advanced above, both rules should be seen as an exercise of the court's power over court

administration. Thus, both rules are valid even where a conflicting statute exists. Further, the legislature has the power to modify either rule under section 37.

The licensing fee rules are more complicated because the court, in effect, raised money and spent it without a specific appropriation. The supreme court took the position that this action did not run afoul of the constitutional requirement that money "drawn out of the Treasury" must first be appropriated because the funds were put in separate funds and not in the treasury. This is a common exercise of judicial power, upheld whenever it has been contested.

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